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CONVENTION ISSUE

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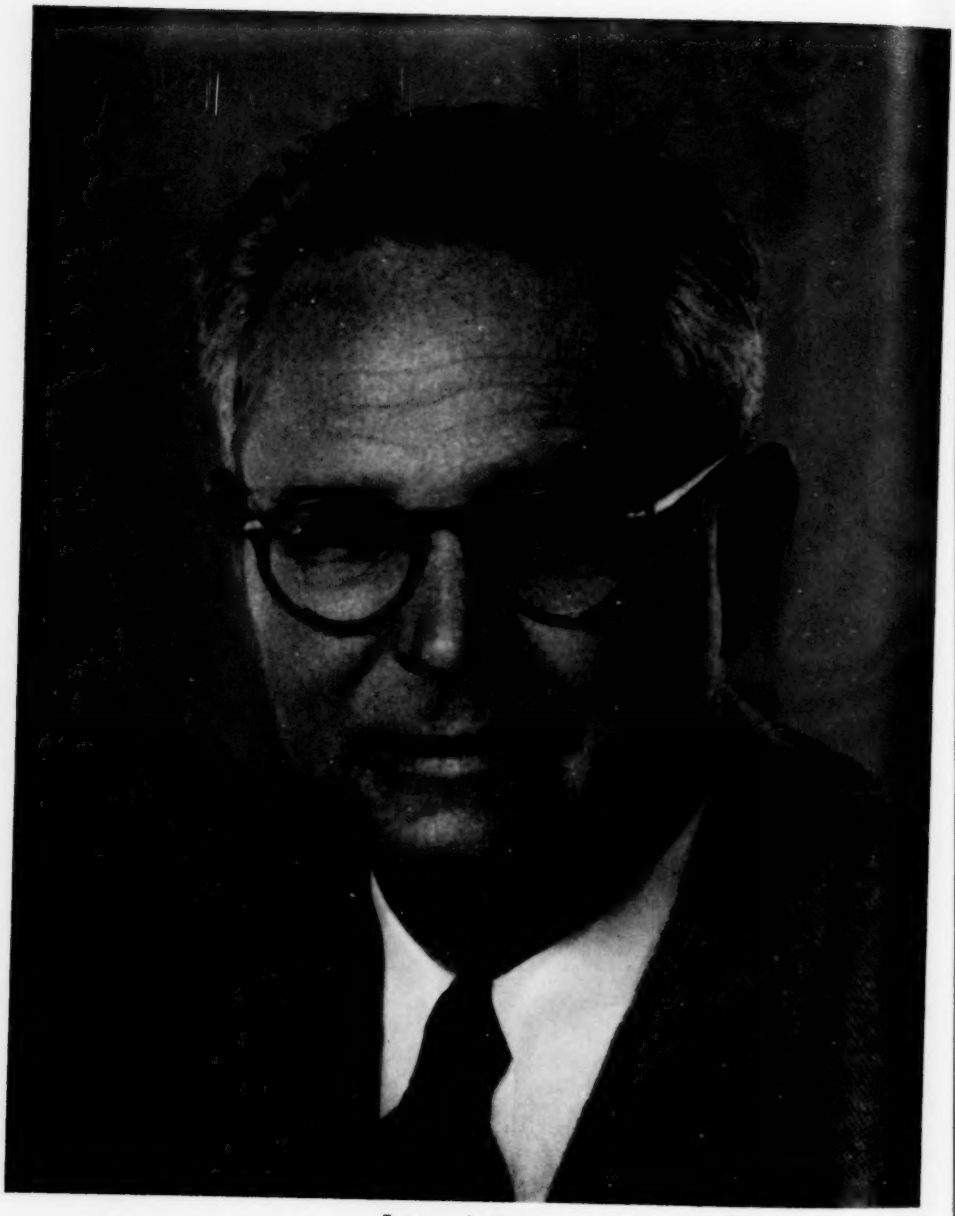

JOSEPH A. SPRAY
President, International Association of Insurance Counsel
1951-1952

President's Page

THE 24th Annual Convention of the Association held at The Greenbrier is now history. It was one of the biggest and best conventions ever held by the Association. The speakers were outstanding, and the subjects discussed in open forum aroused wide interest. Our past President, Wayne E. Stichter and his committee members did a most excellent job, and the members of the Association are indeed greatly indebted to them for having given so unsparingly of their time and effort.

The thirteen outstanding committees have been appointed, and you will note, with few exceptions, the vice-chairmen have been advanced to the chairmanship of their respective committees. It is believed that such a practice will serve to promote more interest on the part of the committee members in the work they are doing. Such procedure should likewise develop good material for the consideration of the Nominating Committee for service on the Executive Committee.

Every new member is cordially invited to let me know upon what committees he is interested in serving.

The 1952 Convention will be held at Lake Placid in June in the Lake Placid Club. The exact date and instructions for making reservations will be sent to each member by the Secretary. Notice will also appear in the Journal. We are, however, happy to be able to assure you that the Club will have ample room to take care of all that can come.

To you members of the Association who were unable, for one reason or another, to attend the Convention, I would seriously urge that you read the many fine speeches, reports and proceedings reported in this issue of the Journal. You will find them not only interesting and instructive, but invaluable in the practice of your profession.

In closing I again want to thank each member of the Association for the honor he has conferred upon me in electing me to the high office of President of this Association, and I assure each of you that I shall do my utmost to carry on the good work that has been done by my predecessor.

JOSEPH A. SPRAY, *President.*

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1951-1952

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PURPOSE

The purpose of this Association shall be to bring into close contact by association and communication lawyers, barristers and solicitors who are residents of the United States of America or of any of its possessions or of any country in the Western Hemisphere, who are actively engaged wholly or partly in the practice of that branch of the law pertaining to the business of insurance in any of its phases or to Insurance Companies; to promote efficiency in that particular branch of the legal profession, and to better protect and promote the interests of Insurance Companies authorized to do business in the United States of America or in any country in the Western Hemisphere; and to encourage cordial intercourse among such lawyers, barristers and solicitors, and between them and Insurance Companies generally.

PROCEEDINGS

24th Annual Convention International Association Of Insurance Counsel

THE GREENBRIER, WHITE SULPHUR SPRINGS
WEST VIRGINIA

JUNE 28, 29 and 30, 1951

THURSDAY MORNING SESSION
June 28, 1951

The first general session of the Twenty-fourth Annual Convention of the International Association of Insurance Counsel, held in the Auditorium of The Greenbrier, White Sulphur Springs, West Virginia, convened at 9:00 o'clock a. m., Wayne E. Stichter, president of the Association, presiding.

PRESIDENT STICHTER: Members of the International Association of Insurance Counsel and guests: The Twenty-fourth Annual Meeting is now in session.

This is the eighth time that our Association has held its annual meeting in this luxurious hotel. Our members and our ladies have always enjoyed coming here and I trust that this year's visit will be no exception. Last year we held our Convention here and we had the largest attendance in our history. The registration so far this week indicates that we shall surpass last year's attendance figures.

The first item on the program deals with the roll call and the reading of the minutes. If there is no objection we will dispense with both.

Hearing none, it is so ordered.

SECRETARY KLUWIN: Mr. President, may I interrupt at this time, please?

PRESIDENT STICHTER: Yes, Mr. Secretary.

SECRETARY KLUWIN: Mr. Stichter, and members of the Association: During the past years a practice has grown up in this association to attempt to compensate the President in some way for all the work and energy expended by him on our behalf during his year. We appreciate that no monetary consideration could ever sufficiently and adequately compensate him, so the practice has grown up of presenting him with some small token of our appreciation and that he may have tangible evidence of his authority to preside over this meeting. So on behalf of the Association, Mr. Stichter, I take great pleasure in presenting to you the gavel as evidence of your authority. (Applause)

PRESIDENT STICHTER: It looks very nice, John. I will find out how it sounds. (Raps with gavel) I think I will be able to rule with that.

Ladies and gentlemen, it is my pleasure to present to you at this time a native son of the great state of West Virginia. He was born in Charleston. He is a member of the West Virginia Bar Association, a former Associate Professor of Economics at West Virginia University and at Morris Harvey College, and since May 1, 1949 he has been

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Insurance Counsel Journal

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INTERNATIONAL ASSOCIATION OF
INSURANCE COUNSEL

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BIRMINGHAM, ALABAMA

MILLER MANIER, *Associate Editor*
BAXTER BUILDING
NASHVILLE, TENNESSEE

The Journal welcomes contributions from members and friends, and publishes as many as space will permit. The articles published represent the opinions of the contributors only. Where Committee Reports have received official approval of the Executive Committee it will be so noted.

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the Insurance Commissioner of West Virginia, the youngest Insurance Commissioner, I understand, in the United States. He will now give us what has been labeled in the program as the Address of Welcome. I present to you the Honorable Robert A. Crichton, Insurance Commissioner of West Virginia. Mr. Crichton. (Applause).

Address of Welcome

HONORABLE ROBERT A. CRICHTON
Insurance Commissioner of the State of West Virginia
Charleston, West Virginia

I believe the label was quite right in the pamphlet. Those were my instructions and that is why I am here. Welcome to West Virginia! If this meeting were held in Peoria the welcoming would start possibly something like this: The Mayor regrets that he cannot be here. He wanted so much to be here, but his mother-in-law suddenly died. The Sanitation Commission would be making that address of welcome. When you come to White Sulphur any hillbilly politician will drop everything he is doing to come up here and give an address of welcome, and that is what I have done. (Laughter).

Now that you are here, where are you? Well, you are in the State of West Virginia. Are you South? Are you in the North? Well, it may surprise you to know that, for example, Chester, West Virginia is north of Trenton, New Jersey, Bluefield, West Virginia is south of Richmond. Wayne, West Virginia is west of Cleveland. And Martinsburg, West Virginia is east of Buffalo, New York. Now I don't know where you are. (Laughter.) We say that you are in a Southern state with a Northern accent, a Western outlook, and Eastern habits.

We may be quite proud of the fact that our population is 2,000,000 and that we have bank deposits of $952,000,000. We have improved roads to the extent of 4,864 miles and we have coal in the amount of 169,000,000 tons.

What we are most proud of is the fact that we are an unusual state. We are the only state that I know of that was born out of constitutional wedlock. We are an illegitimate offspring. We are the only state that seceded from a state that seceded. Some people may call us impolite names occupying our illigitimate role. We choose to call ourselves mountaineers. The great mother state of Virginia may be proud of the fact that they are known as the Mother of Presidents, mother state of Senator Byrd, but when you cross these mountains and are issued your visa and given the password, I want you to know that you are not in Virginia; you are in West Virginia.

We are not Southerners down here. You ask a native about the Confederacy and he will want to know if he can outdrive Sam Snead. We are not Northerners. Most of us think Yankee is a river in China. We are not Westerners. To us a pinto is still a bean, a doggie is still a hound, and Jeans are two girls with the same name. (Laughter) We are not Easterners. The Sears Roebuck catalogue far outsells the adult comic book New Yorker. So we simply say we are West Virginians and we are glad to have you among us.

For a number of reasons, the first of which I mentioned in this labeled address, I am glad you came to White Sulphur. There are a lot of golf stories that grow up at a place like this. One of the most typical and the most truthful one relates the story of a hang over lawyer one Friday morning after having spent several pleasant hours in the Old White Club and after having foolishly made an engagement to play golf that night he got up bright and early around noon and went down to the Casino. Somehow or another he gathered together enough energy to put on his golf clothes, gathered enough energy to take the driver out of the bag and got enough energy to have the caddy wash the ball off for him and tee it up. The caddy pointed out what direction the green was and he hit the first shot in his relaxed position and it went very well right down the middle of the fairway. He thought that was all right.

He hit the second shot and likewise in a relaxed position that went fairly well down the fairway. On his third shot he didn't much care about that time because it was really starting to get hot. The third shot went into the cup. He turned to his caddy and said, "What in the hell do I do now? Give me that 9 iron and I will be sure to make it this time." (Laughter)

They tell another story that probably is very true about a lawyer who went to hell. It seems that he let a client get out of the state before he collected his fee, or some violation of the ethical code—I don't remember just what. Anyhow this lawyer went to hell and saw a great number of his friends down there. This lawyer was a great golfer, so the first thing that interested him upon reaching his destination was the layout as far as golf was concerned. He went to the head man and said, "Now that I am down here for a spell I would like to play a little golf."

"Well, that's fine." So Satan took him out and showed him the golf course, which had a wonderful layout, beautiful fairways, nice greens, no sand traps, no rough, no waterholes, had blonds and brunettes for caddies, wonderful clubs, perfect golf bag—everything was fine. He gets up to the tee and gets out his new No. 1 wood, turns to Satan and says, "Now here we go; give me some golf balls."

"Golf balls! There are no golf balls; that's the hell of it." (Laughter)

I hope you do not run into the same trouble when you are out on the golf course here at White Sulphur.

West Virginia is a pretty good state for lawyers, but it must be because there are so many of them here. It is a good state if they can master the archaic rules of common law pleading, and I think that we have a good record of the practice of law in this state, but we are pretty particular in West Virginia. We don't have any attorneys or barristers, we just have lawyers down here. The definition in West Virginia, at least to separate the men from the boys, is the fact that a lawyer is one who has graduated from a law school, an attorney is a lawyer with a briefcase, and a barrister is an attorney with a Homburg who carries something else besides his lunch in the briefcase. So I speak today to a group of barristers as a young lawyer.

I believe that you find over the past that the courts in West Virginia have been reasonable and that unreasonable and excessive verdicts are not common in this state. People in this state or any state like West Virginia know their courts. As you well know, in a state like West Virginia the court house is the thing in the county and so the people in a state like this appreciate and know the very fine work that is built around the practice of law.

You know, in West Virginia we are democrats, that is, at least most of us, at least as a majority voting majority, or at least the ones who control the votes who vote the majority (laughter), so we are a democratic state like Missouri. We are a border state like Missouri, but I can assure you of one thing, we sure don't think the same way! (Applause) We believe in the ability of our own industries to solve their own problems without government interference, and I can assure you that it will continue to be that belief in this state forever. (Applause)

I have just read to you four sentences, probably the most serious thought or statement I will make all day. I am going to close before someone says to me what an old college professor said who was at West Virginia University. I was on the faculty at the time and, as you know, any university is about like the Army—the youngest man is the Pfc. and the oldest college professor, regardless of merit or talent, is the generalissimo. This particular generalissimo was a professor emeritus of some big subject, probably philosophy, and he had the privilege of sitting at the head table every time there was a banquet. Well, like old college professors and rich people and presidents of insurance companies he was eccentric and he had the right to be eccentric. His one eccentricity was that he always wanted his coffee before he did anything else. Hell may be freezing over, the walls may be tumbling down, but he wanted his coffee first.

So this particular day the toastmaster was going at great length to tell me what a fine guy the next speaker was, a person he just met two minutes before, but the professor was getting his coffee and just as the toastmaster had built his speech up to the greatest crescendo the old professor spit out his coffee. Everyone turned to look at him. He said, "Well, hell, some other

damn fool would have swallowed all that stuff." (Laughter)

As to what I have been saying to you, I don't want you to swallow all that old damn stuff. As the program says, I have finished my address of welcome. I welcome you to our fine state. If there is anything that I can do to make your stay more pleasant, let me know. I am a walking chamber of commerce, and if you want anything done let me know and I will call upon another Democrat to see that it gets done.

(Applause)

PRESIDENT STICHTER: Thank you, Mr. Crichton.

The word "hell" as we heard mentioned several times in the course of our last speech has become a bit commonplace, but mothers of five-year-olds still like to keep the youngsters from adopting the use of that word, and so it was with this particular mother who had a five-year-old son who was constantly using the word "hell." She tried every thing to stop it and she did not succeed, and she concluded she would have to take some drastic measures. So one morning at the breakfast table this sort of thing ensued:

"Now, Johnny, as soon as you finish your breakfast I want you to go up and brush your teeth."

He said, "Why in the hell do I have to do that?"

"I have told you and told you you must not use that word and I am going to have to take some drastic action. If you don't stop using that word I am going to have to ask you to pack your bag and leave, because you simply can't live here with Daddy and Mother if you are going to persist in using that kind of language."

He said, "Oh, what the hell." So he packed his bag and left the house very bravely without a tear in his eye, and as he went down the walk Mother stood there and watched him and tears started coming down her eyes, and she wondered how soon he would return. When he got down 100 feet he turned around and started back and the tears just gushed forth from Mother's eyes because she loved Johnny as every mother loves Johnny, and he came back up to the house and she was all set to welcome him and hug him and squeeze him and kiss him. As she opened the door with a smile Johnny said, "I am leaving, Mother, but where in the hell do I go?" (Laughter)

For the response to this very fine address of welcome by Mr. Crichton I shall now call upon another illustrious West Virginian, also from Charleston, a very hard-working member of our Executive Committee, an eminent lawyer and scholar, a fine gentleman, your friend and my friend, Stanley Morris. (Applause)

Response to Address of Welcome

STANLEY C. MORRIS
Charleston, W. Va.

Mr. Stichter, Commissioner Crichton, Ladies and Gentlemen of the International Association of Insurance Counsel: It is a pleasure to respond to this gracious welcome by the Insurance Commissioner of our state so thoroughly in the tradition of things in West Virginia. I have taken a special pride in the achievements of this young man because I think his initial appearance in the courtroom was as one of my witnesses in a lawsuit, and you can be assured that he is at least thoroughly instructed in the duties of being a witness. What he may have learned about the law is not my responsibility, I hasten to assure you, and so when some of you in your official relations with him find that he is going astray somewhere, if he ever does, and I doubt that he will, you can be assured that it is some weakness that has crept in after he got out from under my tutelage.

It is a pleasure, I am sure, to all of us in West Virginia to have this distinguished group here. Commissioner Crichton, you see before you the greatest trial lawyers in America. I make that assertion and I suggest that you attempt to verify it in the en-

suing three days or so you will spend here with these gentlemen and their charming families. Under the pleasant and convivial conditions which prevail you will be able to accumulate the best evidence on the subject that could be had—the admissions of these gentlemen themselves. (Laughter) When you have something on a fellow by his own admission you have really got him, so if you just mingle among them and listen you will hear many a story of forensic victories won and how they put the double whammy on the leading personal injury lawyer of their respective communities on many an occasion, and you will come away with the conviction that they have won every lawsuit in which they ever appeared, because you will never hear of a case that they lost.

They are equally accomplished in many other fields and I must warn you about that. Some of them are going to out-Goren Mr. Goren at the bridge tables before the thing is over. Others play quite nasty Canasta, and I warn you not to get in a game of galloping dominoes with some of these boys from the Deep South particularly who accompany their efforts in that game by a sort of running chant to the goddess of fortune having to do with the need of the babies of the family for a new pair of shoes, and if one of these Southern boys ever turns to you and says, "It is my dice now, sir," you better remember that you have an urgent engagement to take Mrs. Crichton down to see the swans.

Bob has given you some picture of our rugged people and we have them rugged here in the state of West Virginia. A story that illustrates it has to do with one of my friends who occasionally appears in the defense of some persecuted mountaineer, and who on an occasion back a few years ago when he saw a number of bedraggled people arraigned before one of our very severe federal judges in that time of prohibition went over to one and said, "Uncle Jim, are you in trouble?"

He said, "Yes, George, I'm afraid I am in bad trouble. The Federals have got me."

"Well, Uncle Jim, I want to help you."

"George, I can't do that because you are a lawyer that gets big fees and you know I aint got no money."

"Uncle Jim, through the years I have come out and hunted over your farm in the mountains. You have taken me and fed me and you haven't taken a penny, and I want to help you. When fall comes bring me in a ham or whatever you can bring in the jug and everything will be all right."

"George, that's mighty white of you."

"Well, now, that that's fixed up, Uncle Jim, let's get down to the facts of the case. What have you been doing?"

"I haven't been doing nothing."

"But, Uncle Jim, they are accusing you of something. What are they accusing you of?"

"They're accusing me of distilling, but I aint done no distilling. All I was doing was running a little brandy off for the children to take to school with them." (Laughter)

One more courtroom story — and this actually happened to me down in McDowell County, commonly known among us here as the Free State of McDowell because of the ruggedness and independence of the people. I appeared in behalf of certain fire insurance companies in regard to mercantile loss in which we were satisfied the claimant had attempted after the fire to interpolate various sums, always on the plus side of their inventory. We knew of no way to demonstrate the correctness of our contentions except to employ handwriting experts, so we went up to New York and employed Mr. Osborne and employed one of the outstanding men in that field. We went to Richmond and got another handwriting expert and for two days we regaled this mountaineer jury with the most technical and elaborately contrived evidence about the writing—pictures made under ultraviolet light, made under angles, made under glass protractors, made over the loops for the writing, and they very scientifically demonstrated the fraudulent nature of these interpolations. After the jury had retired for thirty minutes or so one of my partners went to the bailiff—it was in the county of Hatfield and a Hatfield was sheriff and this bailiff had been there for many years under a succession of Hatfield sheriffs, and there hadn't been anybody sheriff but a Hatfield for about thirty years—and this partner said, "I am beginning to get encouraged. The longer they stay out it proves to me they are giving careful consideration to our contention."

The bailiff was a tall, lanky mountaineer. He pulled himself up, took a

skillful shot at the spitoon and said, "Young feller, consideration hell! They haven't yet found a man that can sign his name to that there verdict. (Laughter)

And our evidence was handwriting testimony!

But I can assure you that not all of our people answer to those descriptions. Hidden away in the hills here of West Virginia are, as the Commissioner has hinted, people of great ability in every field.

He gave you the description, which I had thought of giving you if he hadn't, of how it is a northern state, it is an eastern state, it is a southern state, and a damn good state it is for the shape it's in.

One of the schoolboys of my acquaintance a number of years ago in an oratorical contest spoke of West Virginia as the war-born state, born of the struggles that kept the nation one and indivisible, the state, as Robert said, that seceded from secession, and he ended up his rhetorical periods by saying, "West Virginia produces coal enough to heat the world, natural gas enough to light it, oil enough to lubricate it, and brains enough to rule it."

The people of West Virginia, I can assure you folks from the outside, are very much like the "Dear Hearts and Gentle People" that live and love in your respective home towns, but it is hard to convince the outsiders of that, Bob. They are still thinking in terms of Daniel Boone, the Hatfields and McCoys, Rimfire Hamrick, who was one of our noted characters, and feudin' and fightin', and before they would permit me to interview you to make this address they required me to make a showing that your family was not presently engaged in any serious feudin' because they did not want to put someone on the platform who might not survive to make the address.

But we have come upon new times in West Virginia. We are quite capable of taking to our hearts this splendid group of people.

You are in the greatest of the springs of West Virginia. You know, there used to be about a dozen of them to which the carriage trade came. You are the modern carriage trade. You are at the fountainhead of American golf, by the way. The first golf ever played in America was played here. You yourselves are the latter-day carriage trade. And, Bob, if you will circulate around these delightful people and meet the wives you will see why these men are not merely successful barristers, but why they are happy individuals. I in behalf of my fellow members of the Association accept your gracious welcome and we will try to enter into the spirit of the occasion, and as a fellow West Virginian I assure you that all of us who are West Virginians will do everything we can to help you make these people realize the warmth and sincerity of our welcome. (Applause)

PRESIDENT STICHTER: Thank you, Stanley.

I should say to you that Mr. and Mrs. Crichton will be with us during the three days of our Convention. I know you will be most happy to meet them and I am sure they will enjoy meeting you.

As I look at the program I see that the next item is the Report of President.

Report of President

WAYNE E. STICHTER
Toledo, Ohio

AT THE 1946 Annual Meeting of our Association, held at Galen Hall, Wernersville, Pennsylvania, you graciously elected me to the Executive Committee for a term of three years. At the 1949 Convention, held at Mt. Washington Hotel, Bretton Woods, New Hampshire, I was honored by election to the position of President-Elect. Last year, in the closing five minutes of our Convention here at The Greenbrier, I was installed as President.

The past five years have afforded me an opportunity to make many fine friendships in this wonderful Association, and to make some small contribution toward fulfillment of the purposes of this Association. These are years, the recollection of which, I shall always cherish. I shall ever be deeply ap-

preciative of the great honor and privilege that has been given me.

In this Report of the President, which the By-Laws enjoin upon me, I shall briefly review with you the origin, growth and development of our Association, and tell you something of its operations and problems, particularly during the past few years.

Our Association was founded in 1920 at Atlantic City, New Jersey, as The General Counsel Association. Its membership at that time was limited to general counsel of health and accident companies. At its Convention held in Toronto in 1927, the By-Laws were amended so as to make eligible for membership general counsel of casualty companies and practicing attorneys representing both health and accident and casualty companies. At the same time, the name of our Association was changed from The General Counsel Association to International Association of Insurance Counsel.

George Yancey, our esteemed Editor, informs me that, except for the two war years of 1942 and 1945, our Association has held an Annual Meeting every year since 1928. He ought to know. He first attended an Association Convention in 1928 at Old Point Comfort, Virginia; it so happened that there were only about a dozen members present at that meeting, and George Yancey was asked to sit in on the Executive Committee, and he has ever since been on the Executive Committee. Moreover, he has never missed a meeting since his first convention in 1928.

Up until the Convention at The Greenbrier in 1932, the meetings of our Association were held at the same time as, and more or less in conjunction with, The International Claims Association, which was primarily a Home Office Association devoted to health and accident and life insurance. At the Association meeting at The Greenbrier in 1932, George Yancey was elected President. At that time, Harlan Don Carlos, who is now serving our Association as Vice-President, was the President of The International Claims Association, which was meeting jointly with our Association. It was agreed at that time that the two Associations would abandon the policy of joint meetings. Since then our Association has had its own Annual Meeting each year, except the two war years which I have mentioned.

After each Annual Convention, from 1928 to 1933, a Year Book was published containing the Convention proceedings—there was no Journal at that time. At the close of the Annual Meeting of the Association at The Stevens Hotel in Chicago in 1933, George Yancey recommended to the Executive Committee the publication of a Journal, and the Executive Committee approved and adopted his recommendation. The first issue appeared in April, 1934; thus was born the Insurance Counsel Journal, of which we are all so very proud. George Yancey has been Editor of the Journal since its first publication in April, 1934.

In all the years of its existence, the Journal has been a unique publication of high standard. It is a dignified and refined Journal; a truly professional publication, both in form and content. You will find no advertising in the Journal; you will not even find pictures, excepting only an occasional photograph of the Annual Meeting place in the Pre-Convention issue and a portrait of the new President in the Post-Convention issue. As a general rule, the Journal does not publish reprints of articles which have appeared in other publications. In recent years the Journal has, I believe, attained new heights of excellence, while publishing more copy than ever before. For instance, the average amount of copy per year during the years 1936 to 1941, inclusive, was 235 pages; from 1942 to 1947, inclusive, 286 pages; and for the years 1948 to 1950 387 pages per year. The increased work occasioned by the increase in the amount of copy made necessary in 1947 the appointment of an Associate Editor, in the person of Miller Manier, who has been of great help to Editor Yancey. You should also know that the work of George Yancey as Editor for the past seventeen years has been rendered because of his love for our Association and its Journal, without any monetary compensation whatever, and without any thought of such on his part. To George Yancey, this Association is indeed greatly indebted for his untiring efforts in our behalf.

George, may I ask you to stand and take a bow.

From the first publication of the Journal in 1934, up to 1946, the Association has enjoyed a steady growth in membership. During the past six years, the membership has been rather constant, varying between 1385 and its present membership today of 1441. An analysis made of the membership a few months ago showed that 190 members of our Association are Home Office Counsel, and the balance practicing attorneys in the field. The Insurance

Companies and Insurance Associations represented in our Association by these Home Office Counsel members total 118. It seems to me that our Association should strive to bring into our membership Home Office Counsel men from a number of the many insurance companies that are not now represented in our Association. This is a matter to which I think the Executive Committee and the Home Office Counsel Committee ought to give particular attention in the coming year.

One of the big tasks with which the Executive Committee has wrestled in the past five years has been the searching out of ways and means of improving the screening of applicants for membership. New rules of eligibility have been developed; more careful scrutiny into the qualifications of applicants has been conducted; there has been, I think, a more conscientious consideration of the merits of each application for membership. However, there is still room for improvement if our Association is to maintain its high quality of membership. While it occasionally happens that the adherence to hard and fast rules on membership requirements works an injustice in an individual case, our experience has shown a real need for the eligibility rules which we have established. In general, I recommend a tightening, rather than a relaxation, of the membership eligibility rules of our Association.

At our 1947 Convention at Spring Lake, New Jersey, Paul J. McGough, the then Association President, in his annual address, recommended an amendment to the By-Laws so as to provide for the election at each Annual Meeting of a President-Elect who should take office as President at the ensuing Annual Meeting. This recommendation was carried into effect at our Convention at San Francisco in 1948, and L. Duncan Lloyd was elected the first President-Elect of our Association.

In my opinion, this change has proved an excellent one. It has made possible a much better administration of the affairs of this Association. It has enabled the President-Elect to make his plans and to appoint his Committees well in advance of the day on which he assumes his duties as President.

Of most importance—it has made possible the meeting of each new Standing Committee at the very beginning of the committee-year and the prompt formulation and launching of the Committees' programs. The result has been that our Standing Committees are doing a far better job under the new system than was possible under the old.

I am happy to inform you that our Standing Committees this year have done an outstanding job, and the final report of each of the thirteen Standing Committees is already in the hands of our Secretary. The study which these Committees have made in their particular fields will, I am sure, prove of great practical value to the practicing lawyers and also to the Home Office Counsel members. These reports comprise more than 250 typewritten pages, and I assure you that every page is worth your careful reading. These reports will, of course, be published in the Journal. At this time, I want to express, on behalf of the Association, my sincere appreciation for the fine work which these Committees have accomplished.

The problem of choosing a suitable convention site has probably given your Executive Committee more headaches since World War II than any other single problem. It continues to be a troublesome one for the reason that there are, indeed, very few hotels in the country large enough to accommodate all those wishing to attend the Convention, and many of those which are large enough refuse to allocate to our Association sufficient accommodations for our needs. The creation two years ago of a permanent Convention Site Committee has been of tremendous help in the selection of a suitable time and place for our Annual Meeting. The data which Chairman Ernest Fields has collected in that time would fill a trunk, and many are the places that he has personally inspected. The idea of a permanent Convention Site Committee should, in my opinion, be continued.

As you will soon learn when you hear the Treasurer's report, the financial condition of our Association is sound. In contra-distinction to the popular practice of the day, we have kept within our budget. Our outgo has been slightly less than our intake. Nevertheless, I am very strongly of the opinion that our budget is too small; that we must have additional revenue in order to maintain the various functions of our Association at the high level which you members have come to expect. We are paying in dues today $15.00 per year, and this includes the charge for the four quarterly issues of the Insurance Counsel Journal. There has been one increase in dues in the past 10 years, an increase from $12.00 to

the present $15.00 figure. In this time we have seen rising costs on every hand, and our Association has not been exempted from the effects of inflation. If our Association is to maintain the present high quality of the Journal and is to meet its ever increasing costs; if your Officers, Executive Committee and Standing Committees are to do the kind of a job that you want done throughout the twelve months of the year; if you want those in charge of the Convention program to bring to the Annual Meeting outstanding speakers of national reputation with a worthwhile message; if you want a continuance of the fine open forum programs that have provoked so much favorable comment year after year; if you want the General Entertainment Committee to provide, during your Convention stay, an enjoyable program of socialibility, recreation, entertainment (and, shall I say, conviviality) in keeping with the wonderfully good times for which this Association is famous—if you are to continue to want all of these things, we must find additional revenue wherewith to provide them. A $5.00 increase in the dues—from $15.00 to $20.00 per year—would provide the additional funds needed. I strongly recommend the early consideration and adoption of some means of providing this additional income—either by increasing the membership admission fee or the dues or the registration fee—in such amount as will enable this Association to efficiently perform its functions and accomplish the purposes of its organization.

I think I should add that no salary or compensation of any kind is paid to any officer or member of the Executive Committee for the work which he does for and on behalf of our Association. I think that is as it should be, and I would not favor the use of any funds derived from an increase in the dues for the payment of any such salary or compensation.

This report would be incomplete without some mention of your governing body—the 16 members who, with the President, comprise the Executive Committee. I have been most fortunate this year in having a most unusually capable and willing Executive Committee to work with; able men, conscious of their responsibility to this Association, possessing excellent judgment, fairminded, practical, friendly, and endowed with a rare sense of humor—they constitute a combination that is hard to find. They have worked as a team, pulling together for the best interests of this Association; without exception, they have fully executed every assignment given them. To them is due the credit for whatever progress our Association has made in the past twelve months. With your permission, I should like them to stand as their names are called. I know there are a number of our members, especially our new members, who are not acquainted with all these gentlemen.

First, I shall present those members whose three-year terms are expiring this week:

Ernest W. Fields of New York City.

Franklin J. Marryott of Boston.

Robert M. Nelson of Memphis, Tenn.

Now, those members who are this week completing the second year of their three-year terms:

John L. Barton of Omaha, Nebraska.

John A. (Tiny) Gooch of Fort Worth, Texas.

Robert P. Hobson of Bourbon, Kentucky.

And, those members who are now completing the first year of their three-year term:

Lester P. Dodd of Detroit.

Stanley C. Morris of Charleston, West Virginia.

Royce G. Rowe of Chicago.

The Associate Editor of the Journal, *Miller Manier of Nashville, Tennessee.*

The Journal Editor, *George W. Yancey of Birmingham, Alabama.*

Immediate Past President, *L. Duncan Lloyd of Chicago.*

Treasurer, *Forrest S. Smith of Jersey City, N. J.*

Secretary, *John A. Kluwin of Milwaukee, Wisconsin.*

The two Vice Presidents, *Harlan Don Carlos of Hartford, Connecticut,* and *Leo B. Parker of Kansas City, Missouri.*

And, of course, The Honorable President-Elect, *Joseph A. Spray of Los Angeles, California.*

They deserve your sincere thanks. Let's give them a big hand.

These are days of world shaking events which at times tend to make us feel that our daily activities and our associations are of small significance, and perhaps they are, relatively, but life goes on, and we must carry on as best we can. True, there are many big problems in this world of ours that must be solved, but there are many small problems too that must be solved day by day, just as this Association has been a great help in the past to lawyers

specializing, as we do, in the representation of insurance companies, so shall we find it most helpful to us in the future in the carrying on of our daily, professional duties and in the preservation of those fine friendships that keep up one's morale and help to make life worth while.

PRESIDENT STICHTER: A few weeks ago in Toledo it was my privilege to hear a most interesting talk on what is being done in the enlistment of national associations, industrial organizations, and other private groups and individuals in the fight against the threat of Communist propaganda and in the dissemination of American ideas and propaganda. The nature of this factual information that was disclosed at this talk, and the confident, easy but convincing manner of the speaker impressed everyone who heard him. I decided then and there that you ought to hear him. I accordingly invited him to address you on this occasion.

Mr. Begg is a naturalized citizen of the United States, having been born in Costa Rica of Canadian parents. He attended schools in England, France, Switzerland, and Spain. He is a graduate of Harvard University and Oxford University. He has had a vast amount of experience in the motion picture industry as a camera man in Hollywood, as producer and director of several educational films, and as an educator or assistant educator for Fox Movietone, Pathe News, and Translux Newsreel theaters. Mr. Begg's contracts in Europe are many and diverse, due largely to his educational background and department assignments in Europe. He reads and understands Italian, Portuguese, German, and Dutch moderately well, and he speaks French and Spanish fluently, and, incidentally, I just learned a few moments ago that he is a former member of the National Republican Committee. I present to you the Honorable John M. Begg, of Washington, D. C., Director, Private Enterprise Cooperation, Office of International Information and Educational Exchange Programs, Department of State, who will address you on the subject, "Insurance for Peace — The Campaign of Truth."

Mr. Begg. (Applause).

Insurance For Peace—The Campaign Of Truth

JOHN M. BEGG
Director of Private Enterprise Cooperation, Department of State
Washington, D. C.

I AM very glad to have this opportunity to address a group of trained professional men and women whose primary interest, in addition to the law, is insurance, because the subject of my talk, the Campaign of Truth, is really part of a many-sided American insurance plan to try to prevent world chaos.

I do not propose to discuss the *military insurance* our country is taking — the stepped up production of arms, of planes and supplies; the drafting and training of new troops to build up our own air, sea and land strength, as well as that of our allies. I do not intend to go into the *economic insurance* this country is taking through the E.C.A. program, nor the efforts being made to raise the standard of living in the underdeveloped areas of the world through the Point IV program.

Rather, I should like to tell you today about the insurance we are taking against the Moscow inspired propaganda of Communism and its ceaseless efforts to poison the minds of men against our free and democratic way of life. I should like to tell you about the great Campaign of Truth which we are waging overseas against the *Soviet's* campaign of hate, of lies and of turmoil.

But, as we consider *how* we are waging this battle for men's minds, let us consider, for a moment, *why* we are waging it—let us consider some of the things that are being said about *us;* some of the actual lies that are being spread among the peoples of the world by the Communist propagandists.

Here are some of the things they are saying: From the Vladisvostok Radio: "The

capitalist pays the worker *just* enough to prevent his death by starvation."

From *TRUD,* a Soviet magazine, which surely belies its name *Truth*: "Three-fourths of the population of the United States is deprived of medical care."

From the Azerbaizhan Radio: "Schools in America are very few in number and education is very expensive, because the capitalists consider it harmful to educate the masses."

And here is a Russian report of a United States Cabinet meeting: "The proposal to reduce the quantity of hydrogen in the hydrogen bomb in order to get money for the Ministry of Education was *rejected* because the bomb industry might complain and a crisis on the Wall Street market might result."

We might well be able to laugh at these Kremlin descriptions of American life, if it weren't for the fact that, unfortunately, too many people actually believe them. *So,* what is *our* answer? *What* are we doing about it?

For many years, your Government, along with private groups and institutions, has engaged in international truth-telling programs designed to increase better understanding between peoples and create good will. Conducted principally in the Western Hemisphere, these programs have paid their way many times over in creating and maintaining solid, healthy relations among the peoples of the 21 American republics.

This was good as far as it went. However, when the menace of Soviet Imperialism became increasingly apparent, following World War II, it was clear that *our* purposes, *our* ideals and our way of life must be made known to *all* peoples and on a *much* larger scale. With the passage of the Information and Educational Exchange Act of 1948, the United States Government embarked, for the first time, on a world-wide program aimed at increasing mutual understanding and good will. But as the months passed and the hate campaign of the communists grew, it was evident that a much more vigorous, hard-hitting program was needed.

It was the realization of this fact that caused President Truman, early in 1950, to call on the American people to support a great Campaign of Truth. He put it this way: "Our task is to present the full truth to the millions of people who are uninformed or unconvinced. . . . Our task is to show that freedom is the way to economic and social advancement, the way to political independence, the way to strength, happiness and peace. We must pool our efforts with those of the other free peoples in a sustained, intensified program to promote the cause of freedom against the propaganda of slavery. We must make ourselves heard round the world in a great campaign of truth."

The task of telling the truth, which Secretary Acheson has termed the "Sixth Element in the Strategy of Freedom," is not separate and distinct from other elements of our foreign policy. It is a *vital* part of what we are doing to build a peaceful world. It is essential to the success of our foreign policy that the military, political and economic measures we are taking be *accompanied* by an effective information and educational exchange program.

The job calls for *resourcefulness, imagination,* and *daring.*

Our *objectives* are clear. They are:

1. To strengthen the unity of those nations devoted to the cause of freedom and to show that *their* interests and those of the United States *coincide.*

2. To spread the conviction that the United States is an enlightened, strong, and determined power deserving the *full* support of other free nations.

3. To stimulate among free nations the building of the unified strength necessary to deter aggression and secure peace.

4. To develop and maintain psychological resistance to Soviet tyranny and imperialism.

Whether or not we are successful in halting the Communist drive for the control of men's minds throughout the world will depend largely on our ability to *identify and reach* those population elements whose attitudes and opinions will be decisive in shaping world events.

We *must* reach them with *convincing* and *influential* facts.

The Campaign of Truth, therefore, has been expanded tremendously during the past year. The number of people working in the program has almost *doubled.* And the output in some phases has been increased as much as fifty times over what was produced last year.

Perhaps the best known and most spectacular part of our program is the Voice

of America. But few people know how extensive the Voice of America is, and how it operates throughout the world. Most of its programs are prepared in New York and then broadcast by 38 powerful transmitters located on the East Coast, in the Midwest and on the West Coast. Relay stations in various parts of the world pick up the programs and retransmit many of them on medium and short wave-lengths to secure a greater listening audience. In many countries *local* networks and stations rebroadcast our programs.

And here is some news that will interest you. Six new languages were added to the Voice broadcasts *this* week. Four of them are in languages commonly spoken behind the Iron Curtain—Tatar, Turkestani, Azerbaijani and Armenian. The other two are Malayan and Burmese.

This brings the total number of languages broadcast by the Voice of America to *45* and the total daily output up to *48* program hours. This is almost double the number of hours and languages on the Voice a year ago today.

In addition to these new languages, the Voice has increased its coverage in the Soviet-controlled areas by stepping up the broadcasts to Lithuania, Latvia and Estonia.

Now, *how* effective *is* the Voice?

One way to check that is by the number of letters we receive. Last year there were over 600,000 of them. The flow of letters we now receive is constantly increasing.

We know too that people *behind* the Iron Curtain listen to the Voice, some of them at the risk of their lives. Here are some definite proofs, taken at random from a recent report on what the *Soviet* broadcasts are saying.

Radio Vilna, for instance, mouthpiece of the Communist Party in Soviet Lithuania *warned* the people against listening to "American slave traders and aggressors"!

Speaking over the Warsaw radio, President Bierut of Poland admitted that the "radio propaganda of the Imperialists, though noisy and mendacious to the point of idiocy, *does* reach the most backward cells of our organism."

The trials and tribulations of a Roumanian radio listener are graphically described by Lajos Konya, a Roumanian poet, whose work appears in a Hungarian radio weekly magazine. "I tried to tune in to the Petofi Station," he wrote, but just as a cob web in a closed down house, America, unsought, was spun around it, barking alone from under her dollar mountain."

As an obvious move to counter the rising volume of Voice broadcasting to Communist China, the Taiyuan Peoples Government has issued registration orders for all radio owners in Taiyuan.

As a final example: In Czechoslovakia, Gottwald recently warned that Czech police would "know what to do" with voice listeners.

Of course, the greatest compliment on the impact of the Voice of America behind the iron curtain is the tremendous jamming operation which the Soviets have developed *against* our broadcasts. That jamming operation has, by the way, been pretty effective. But we are now beginning to overcome it. And, believe it or not, the Soviets spend several times more for jamming our programs than we do for *all* our *worldwide* information activities.

As you know, radio is one medium through which we can blanket the world with the truth. But there are other equally effective ways. We have established United States Information Centers in 133 cities throughout the world. Supplying these centers with news, books, magazines, leaflets, maps, special exhibits, and films are the five operating divisions of the International Information and Educational Exchange Program.

The International Press and Publications Division produces news, feature materials and pictures which reach more than 10,000 foreign newspapers and periodicals with an estimated readership of 90 million people. Right now, for instance, in many parts of the world 60 of our diplomatic missions are monitoring the wireless bulletin. This is a fast-moving daily news service which is put out in four editions . . . for Europe, the Near East, Latin America and the Far East. Each bulletin runs around 7,000 words. It is made available by our information offices to foreign press agencies and newspapers, after it has been translated into the local languages.

This world news service is supplemented by a ten-page Air Bulletin that is sent out twice a week; by special articles and magazine reprints from some 250 American magazines; and by technical newsletters

and pamphlets which provide basic information about the United States.

Here are a few facts which will give you an idea of how extensive an operation this is. *Last* year we printed and distributed 4,946,380 booklets and leaflets. *This* year we increased this output to 50,250,000. *Last* year we distributed less than a million posters. *This* year our mass audience appeal was tremendously increased through the distribution of 50,200,000 posters. The distribution of pictures and plastic plates was increased by 400,000. And the total press output in words almost tripled. Press communications rose from 8,900,000 words last year to almost 25,000,000 words this year.

Another medium which we are using, one which is particularly effective in reaching persons who do not have radios or who are illiterate, is the documentary motion picture. Through these films, people can actually see, as well as hear, the Truth about the United States in their language. At this moment, 200,000 of them are gathered in labor halls, theatres, schools, town squares and other meeting places in the free world, looking at our films. They are recorded in more than 30 languages and are distributed through our missions overseas. Many are shown by our own equipment, including mobile units which can penetrate even the remotest areas.

And I can asure you that the films are not only effective, but popular. A recent report from Italy, for instance, states that after a showing in the town of Mondovi, the audience refused to leave and 1500 people who were waiting to get in protested. The police were called out to handle the situation.

Our program does not stop, however, with voice broadcasts, mass distribution of news, publications and motion pictures. We also maintain 140 well-stocked libraries in the information posts overseas. Last year they were visited by more than 24,000,000 persons seeking the truth about the United States and honest information about the world we live in.

Another phase of our operation, a very basic and important one, is the exchange of persons program. Through the Smith-Mundt Act and the Fulbright Act, it is now posible to provide funds for carefully selected persons from other nations to spend a period of time in the United States, to travel freely about the country talking with people in all walks of life, and to study in the particular field in which they are interested.

I think you will all agree that an interchange of persons can be most effective in building world understanding. A visit here and a chance to see, first hand, just what the United States is like, and then to compare that personal picture with the one the Soviet propaganda machine would have them believe, is positive proof of who is telling the truth. A great many of these visitors have come here with preconceived notions based mainly upon Communist propaganda. One editor, for instance, freely admitted that he had changed completely the editorial policy of his newspaper after having visited in this country. Another stated that he had *sneered* at the Statue of Liberty when he arrived, but *bowed* to her when he left.

Last year, nearly 7,000 persons were exchanged with 56 foreign countries. Every one of these new friends of ours is helping us tell our story in all parts of the world.

Although I have been stressing the Campaign of Truth, I do not mean to imply that we are *alone* in telling the truth to the people of the world. Practically every free nation is conducting an information program. A splendid example of many nations working together for a single purpose—Peace—lies in the North Atlantic Treaty Organization. Here, under General Eisenhower, the treaty nations have combined in an information program for which the basic theme is: Through unity and strength, the world can attain security and peace.

Putting all of these activities together in one package you find a worldwide information and education program designed to tell the story of individual freedom in words, in pictures, and by example, to people everywhere.

But we all know that something more must be added to make it universally effective. That *something* is the enterprise and the know-how of American business, of civic groups, organizations and individuals. That is the basic of our Private Enterprise Cooperation program.

When the average American asks: What can *I* do to help preserve the culture and the freedom which we have built during our 175 years as a nation, *we* endeavor to give them concrete suggestions on how

they can play their part in the Campaign of Truth.

For instance, a group of civic-minded business men in New York asked us, shortly after our program had been established in 1948, what *they* might do. We urged them to make a very basic approach to the problem before they arrived at any decision as to the type of action they should undertake. So they conducted a survey throughout Europe — a survey patterned very much on our own Gallup or Roper polls.

When they had completed it they had in their hands the basic misconceptions about America and Americans which exist in the minds of Europeans. The next question was: What to do about them?

One of the best ways to overcome these misconceptions was through people talking to people—Americans to French, Italians, Greeks, Chinese—to those who did not know us. The logical persons to help in this field were the foreign language groups —that great 35,000,000 of first and second generation Americans. If *they* would write to their friends and relatives overseas, if they would send books and magazines along with their packages of food, if they would help convince their contacts abroad that *we, too,* seek only peace, then we would go a long way towards winning the war for men's minds.

That was how the "Letters from America" campaign began. Today, through weekly editorials in 260 foreign language papers and 195 foreign language radio programs, some sixty nationality groups are participating in this program directed by the Common Council for American Unity. The Post Office Department has reported a continuous increase in letters to overseas points since this program was started. And last year more than 21 million letters penetrated the Iron Curtain.

There are many other groups and agencies participating in this people to people program. Rotary, Lions, and other service clubs, for instance, have written to their counterparts overseas. They know that there is no substitute for a letter of friendship except personal contact.

In the field of magazines—good American slick-paper magazines that do so much to tell our story—we can't begin to supply the demand for them throughout the world. So we have endeavored to get business firms, corporations, chambers of commerce and individuals to collect and send used magazines overseas. The chamber of commerce in Pasadena, California, for example, has just started a "Magazines for Friendship Campaign" that will send thousands of magazines to the 225 largest colleges and universities in the world.

A large corporation began collecting magazines in their New York office and sent them to *their* offices in *foreign* countries. The demand grew to such proportions that the collection has been extended to their other offices throughout the country.

A *meat* packing company asked us what they could do. We suggested used magazines. They sent them to Uruguay. The president of the company has told us that it was one of the best public relations programs they have ever undertaken.

Last year the American people contributed more than $600,000 to the CARE book program. Thousands of technical, scientific and educational books were sent overseas to restock war-torn libraries, and to bring new and interesting scientific and technical knowledge to an information-hungry world.

In addition to this, 14 public spirited publishers made available more than 134,000 text book remainders. American business and industry gave us thousands of books, pamphlets and technical magazines for distribution abroad. The 48 state governments gave us 283,000 booklets and pamphlets on their states.

As lawyers, you'll be interested to know that only recently the State of Louisiana and its Law Institute formally presented collections of Louisiana Codes and Statutes to the Law Schools of France and official libraries designated by the Ministry of Justice. It was a splendid gesture of friendship, which might well be extended to other states and countries.

American maps and calendars are in tremendous demand. In sending them to schools overseas, we not only demonstrate our friendship, but they serve as constant reminders of life in the United States. Many companies will order overprints of their 1952 calendars — particularly those that depict some phase of Americana. Only yesterday I received a dispatch from Singapore asking us to do everything possible to

secure thousands of good American calendars.

We have a continuing need for them. In fact, we have a continuing need for almost everything that will help tell our story. Free enterprise, freedom of the press, freedom of assembly, freedom of worship and freedom of speech — these are the things we must tell, and keep telling, if the free world is to win this war of words.

Another—a new approach to international relations has developed since the end of the last war. It is a local community project called town affiliations. It began when certain cities in the United States adopted war-torn towns in Europe and sent them food and clothing.

This program has now become a cultural affiliation—where school children exchange letters and school books, drawings and albums. The mayors, on some occasions, have even exchanged offices on a temporary basis. The bar asociations have found a community of interest among lawyers in affiliated towns overseas. And a steady development of interest in each other has prompted hundreds of unofficial family visits. Certainly this is a demonstration of the desire of *all* peoples—American and foreign alike—to get to know each other better and to live in a world at peace.

For only by knowing what he *stands* for, can we appreciate the other fellow's point of view. And whether we like him personally or not, in knowing him and what he believes in, we can respect his viewpoint. This is basic, personal insurance against a Cold War becoming hot.

We all recognize that we face a ruthless, unprincipled, power hungry enemy. Yet it is an enemy which can be goaded into vitriolic tirades by our simple words of truth. The blanket of lies which the Kremlin has spread throughout the world has succeeded in winning millions of square miles of territory in which enslaved millions now look to the free nations as their only hope of ever regaining their personal freedom.

We can help to halt the onward march of aggression by a vigorous, forthright campaign of truth. We know now that the truth is making deep inroads on the minds of men throughout the world. But we must continue, everyone of us, remembering always that in this world-wide war of words, *every syllable counts!*

Now is the time for us to use them, in the manner and in the place where every syllable of truth will count the most.

PRESIDENT STICHTER: Thank you very much, Mr. Begg, for a very informative talk.

I should like to remind you ladies and gentlemen that Mr. and Mrs. Begg will be with us during most, if not all, of our stay here at The Greenbrier. I hope that all of you will make it a point to meet and to talk to Mr. and Mrs. Begg.

When I asked Bob Hobson to serve as Chairman of the Convention Program Committee I did so with the full expectation and, I might add, the hope that we would have a Kentuckian on our Convention Program. And Bob has come through as I expected he would. I am going to ask Bob Hobson of Louisville, Kentucky to introduce to you our next speaker. Bob.

MR. ROBERT P. HOBSON (Louisville, Kentucky): Mr. President, before I undertake to introduce the next speaker I want to say to Mr. Crichton and Stanley Morris that we in Kentucky vigorously contest their claim to all the rights of fightin' and feudin'.

Our next speaker, after a very usual education, was elected a circuit judge in Kentucky. He resigned from his position as circuit judge and went into the United States Army as a private. He came out as a captain after serving in France and Germany. He assisted in the reorganization of the German judicial system and after returning home and serving in the United States Senate was appointed as an advisor to the Secretary of State on the North Atlantic Treaty and served as a delegate to the General Assembly of the United Nations. He spent seven months in Europe consulting with representatives of the European powers on ways and means by which cooperation could be obtained between the United States and them. I want to introduce to you Mr. John Sherman Cooper, presently located in Washington, D. C., but who makes his home at Somerset, Kentucky, who will speak to us on the subject of "The Responsibility of World Leadership." Mr. Cooper. (Applause)

The Responsibility of World Leadership

HONORABLE JOHN SHERMAN COOPER
Washington, D. C.

MR. HOBSON, Mr. Stichter, Mr. Begg, and Members of the International Association of Insurance Counsel: I want to thank my friend Bob Hobson for his very kind and generous introduction.

Speaking of introductions, I am glad he also made it a factual introduction because I remember other introductions that I have had in the past. I remember one occasion in particular when I as a candidate had gone to the eastern section of my state, Kentucky, into the mountain section, in fact where I live, to speak with a fellow candidate who served in the House of Representatives. When we arrived there we found a happy situation. It was Saturday afternoon, the town was full, mules and horses were hitched to trees, and an old judge met us and said he would have charge of the speaking, so he took us into the court room. He began by saying that it was a great honor that they could have with them that day a distinguished servant of Kentucky who had served in the Congress, one who had been a great friend of labor, a great friend of industry, of the farmer, and finally the veteran. He said, "Not only has he been a great domestic servant, but he has also been an international servant." He said, "It is my great pleasure now to introduce to you this distinguished guest." Then he turned around and said, "Which one of you fellers wants to speak first?" (laughter).

It is a great honor to be asked to meet with you this morning and to speak to you for a little time about some matters which I know are of great concern to all of us. I think at the outset, in view of the introduction which was made by my friend, it would be appropriate to state the capacity in which I speak. It is true that I have had some assignments with the government of the United States in the last two years, but they were of a temporary nature. At this time I have no official connection with the government or with any department of the government and what I have to say is upon my own initiative and really represents very general conclusions based upon the observations and experience that I was able to gather in the service that I mentioned.

I am sure that history will record that no people have ever made a more earnest and conscientious effort toward the establishment of peace than have the American people in the years since World War II closed. I think much progress has been made and yet the course of events which have threatened us almost every day since the close of the war, which has led us into a war, and which holds always the possibility of a much larger war—perhaps a third world war—has roused deep concern in the minds of all of our people and has caused them to examine very closely, and sometimes with resentment, the policies which have been undertaken by our country. I think that all of you will agree with me that these sobering developments make it imperative as never before to understand the danger which this country faces, to appraise the instruments of peace that are available to us, and I believe in the interest of our own security and future to attempt to reach the greatest possible agreement upon the policy that we must pursue.

I happen to be one of those who believe that the great debate which ended some time in March or the early part of April, upon the question of sending troops to Europe, which in a larger sense was actually a debate upon the question of the relationship of Europe to the security of the United States, and the great debate which has just finished which reviewed almost all of the total implications of our foreign policy, may lead toward that end.

I am certain that there will never be any complete agreement because conformity of thought does not happen to be an attribute of our people or of our system, and I am certainly not naive enough to believe that either political party will lay aside political considerations in these next two years or that this debate will end before the American people have registered their views on policies and upon men. Yet I am convinced that certain very valuable results have come from these debates.

First, they have given the American people greater information than they have been able to have in these last few years and certainly upon that information there is a possibility of building an understanding and support of whatever policy is finally established as our true foreign policy.

Second, I think that it has caused the Government of the United States to more sharply define its own policy and to prepare for a better execution of its policy.

Then, third, I believe also by this discussion it has reduced, simply by throwing light upon these debatable questions, the area of disagreement.

Finally, we may hope that we can lead to a true bi-partisan policy in the best sense.

I think it would be rather ambitious this morning if I attempted to discuss the full implications of the foreign policy of the United States which might be employed in my subject, "The Responsibility of World Leadership." In fact, when I talked to Mr. Hobson a few weeks ago I said to him that it was very difficult to select any subject at any particular time. Those who have the responsibility to speak—and I am not one of those—cannot often do so and almost everything else that is said today on foreign policy seems to be of a general nature and simply a relation of facts that have already occurred, so this morning, if you will permit me, I have decided to digress somewhat from this subject and to discuss some of the specific questions that have been raised toward aspects of our foreign policy, I believe with misgivings and sometimes resentments upon the part of our people. I must confess, too, that they will be general, but I hope that they may at least point up some of the difficulties and the responsibilities of our undoubted world leadership. And if, after I have finished, there are questions which may be provoked upon some of the things which I discuss, I would be very happy to have your comments.

Among several questions which I think have disturbed the American people in the last few months—and in saying this I do not exclude many others—one, I would say, questions the relationship of the United States itself and the United Nations' foreign policy—questions the United Nations' effectiveness today and questions its prospects in the future as an effective instrument for world peace or as a reflection of our own policy. Other questions have been raised about the participation, the cooperation, the adequacy of the support that has been given to an announced collective security policy by our allies. Many questions have been raised about their willingness to fight, their willingness to make efforts to defend themselves, and their full participation in this great effort toward defense against aggression. The question is still unresolved in the minds of many of our people about our policy toward Korea, about the necessity or the reasons for entering that conflict, about our aims there, about the possibilities of ending that conflict, and whether or not the venture itself has been worth while, and of course the questions continually arise as to the extent of our participation in world affairs and our involvement in more and more enterprises throughout the world. So for just a few minutes I do want to discuss some of these specific problems with the hope that they do meet some of the questions that do arise in your minds.

I will speak first of the relationship of the United Nations to the foreign policy of the United States. Two years ago when I was first appointed as a delegate to the General Assembly of the United Nations I did not have a very clear idea, although I had served in the Senate for a time and had been interested in its work, but I did not have a very clear idea of its functions and of its purposes, and in meetings throughout the country I found that my conclusion was not very far wrong. I believe that our people have not very clearly understood its purposes and also that their reactions toward its work have varied as its success in its work has also varied.

You will remember last year at the time of the meetings of the Security Council when almost everyone was waiting at their television set to observe the debates in the Security Council that interest in the United Nations was very high, and that interest continued during the early part of last fall when it seemed that our efforts in Korea were successful, but as our troops moved up and down the peninsula interest and support of the United Nations also seemed to move up and down, and when the intervention of China came you will agree with me that the United Nations reached a very low stage.

It seems to me that the criticisms that have been directed toward it could be very well stated to have been derived from two great sources. One source comes from those who do not believe in the theory of collective security. They are sometimes called

isolationists, but I think that is too general a term. Nevertheless, they believe that the United States could better handle its own international problems alone, that it could defend itself. They are concerned lest a system of collective security has already involved us in a war in Korea and might involve us in further wars in the future. They would prefer, to use the popular phrase, that the United States go it alone or at least in company of its own.

In answering their criticisms I want to review briefly what I consider to be the fundamental requirement of our foreign policy. I know it takes a great deal of temerity to attempt to define our foreign policy. I remember the story, which Mr. Hobson would know, of Irvin S. Cobb, the great humorist, when he once returned to Paducah and announced he would speak on Wales and he said that his subject grew from the fact that he did not know anything about it and he was sure that his audience was about in the same fix; and so when I speak of foreign policy I speak of a subject which is mysterious and seems obscure. Nevertheless, I think it is the fundamental purpose of our foreign policy to protect the security of this country, to protect its people, and to protect the free institutions which gave it meaning and light. And even though those institutions have been under heavy fire for the last few years even in this country, I think we will all agree that without them this country would have no meaning.

Such a policy rules out immediately the idea of peace at any price because our country has always fought and will always fight when this country or its people or the free institutions are threatened. The real problem is to decide at what price and at what time the effort should be made and what effort should be made. We should have learned something and I believe we have from the experiences of two world wars. We have learned that we cannot isolate ourselves from the consequences of war any place in the world. We have learned through our experience in wars with Germany and Japan that it is the purpose of an aggressor to strike down nations one by one, looking to that day when there is no combination of power or of men that is able to offer effective resistance to aggression, and that is the policy of Russia in the world today. And that aggression, if undeterred, would inevitably knock at last at our own gate.

That aggression since the war has subverted ten of the twenty countries of Europe, has overrun the ancient country of China with over 400,000,000 people. It has brought direct aggression in Korea and maintains an army today of nearly 3,000,000 men, the greatest land force, the greatest air force, and the greatest submarine force in the world. It is that danger that this country and the free peoples of the world face. And certainly I believe reason and every impulse for our own security should make us know that our best chance for security lies in the collective strength and the collective forces of the free peoples of the world that can be held together, and that is one of the great purposes of the United States today, to hold together the free peoples and their strength in effort to deter and to dissuade this possibility of greater war.

You may say to me, "I do not like the idea of collective security." I can only say to you that perhaps you are too late because since the world war the Congress of the United States, representing the people of the United States, in its confirmation of the charter of the United Nations; in its confirmation of the Rio Pact, which joins together our country with the countries of South America; in its confirmation of the North Atlantic Treaty Organization, which joins our country with the countries of Europe; with our Military Assistance Program, with the decision to send troops to Europe, has consistently approved the idea of collective security as a policy of the United States.

Another criticism which has been directed against the United Nations might come from those who believe in the idea of collective security, but who say that it is a failure because it does not have the organizational or the constitutional structure to prevent war or to suppress war. It is my view that the organization of the United Nations, while defective structurally and constitutionally, yet possesses through its own organs, and particularly in the General Assembly, through the exercise of precedent and interpretation, and through its ability to create subsidiary organizations the power to establish the mechanisms and processes to deter breeches of peace and to suppress war, with one condition; and that condition is that the members of the United Nations have the will, a sense of responsibility, and the spirit to carry into effect the decisions that are made by that body, and again I will illustrate by a review of recent history.

You remember the purpose of the United Nations was to settle disputes by peaceful means. If those disputes culminated in war then we were to establish an international force which would suppress war. The long-term purpose was to eliminate the causes of war—hunger, bad health, poverty—and then to help bring the backward nations of the world freedom and to establish a better understanding of human and individual rights throughout the world. There was established several organizations to do that. In fact there were five of them: Security Council, the General Assembly, the International Court of Justice, the Economic and Social Council, and the Trusteeship Council. The two most important are the Security Council and the General Assembly. When these organizations were established it was recognized by all of the fifty-two who signed the Pact, and particularly by the five great powers, that this organization could not function effectively without the cooperation of the five great powers.

The real reason that the United Nations has not achieved its great purposes is not so much in an organizational or structural deficiency. We think so much of organizations today as solving everything. The real reason is because there has been reflected in that body the same imperialistic attitude by Russia that it has exercised throughout the world, and that Council is made up of eleven members with three functions to maintain peace. You remember those three committees that were established—the Atomic Energy Committee, to provide for the control of that dreaded weapon; the Armament Committee, to provide for the reduction of armaments; and the Military Committee, to set up this military force which could suppress war. All of those efforts have been frustrated by the vetoes of Russia, and so the Security Council stood stripped naked of power.

In the General Assembly Russia attempted again to obstruct its activities in the same way. It had no power to enforce its recommendations. It was made up of the representatives of all of the sixty members who meet just once a year. Its powers are purely that of recommendation and moral suasion, but again it has been faced with the obstructive tactics of Russia. I have served some time in Kentucky politics, where they do not desist too much from personal attacks and vilification, but I must confess in my service in the United Nations I was shocked by the continual vilification and abuse of the Soviet Union against the United States particularly, and the other free nations of the world.

It seems to me that the true proof of the value of the United Nations has been in its ability to surmount some of these obstacles. It sent, prior to Korea, its commissions throughout the world and prior to Korea it had been able to settle disputes which might have led to a general war. I remind you of Iran, Indonesia, Israel, and its influence in the settlement of the dispute in Berlin over the blockade. It has had its commissions work upon many, many other countries. It exercised a moral force, I think, whose value we may never be able to judge.

I would say from our own point of view that one of the best things that has been accomplished by the United Nations is that it has given the representatives of the sixty nations of the world a chance to see and understand Russian propaganda. I know that the Russian propaganda is very good, as you do, and I am sure, as the speaker who preceded me pointed out very clearly, it appeals to the resentments and to the prejudices and to the needs of various groups of peoples all over the world, and only when it is considered as a whole can its inconsistencies and its falsifications be seen. During these years the representatives of these sixty nations have been able to observe the Soviets. They have been able to understand these inconsistencies, these vilifications, these falsehoods, and they have been able to take that message back to the people of their country. I would say if there had been no other reason for its existence than to give the people of the world a chance to see their deceit and their purposes, it has been eminently worth while. Then it has given also an opportunity for the people of the world to work together, and finally, I think that no one can ever derogate the great value of the moral judgments and moral persuasion.

It reached its greatest test with respect to Korea. Korea was, more than any section of the world, the child of the United Nations. After the armistice with Japan when it had been arbitrarily divided at the thirty-eighth parallel between the United States and the Soviet Union, efforts were made by the United States with Russia for several years to provide for the unification of Korea, and finally the United States referred the matter to the United Nations. The United Nations sent

a commission to Korea which actually was in Korea at the time the war in Korea broke out, and this organization which had been built upon the idea of collective security met the first challenge of its will and its ability to do something about it. It was able to do something at first because Russia was absent from the Security Council. It passed its resolution calling upon Korea to resist and to deter its aggression. It denounced the aggression of Korea. It called upon the nations of the world to furnish forces to deter that aggression. It named a supreme commander to take charge of the operations in Korea. There was no machinery to do it. It simply depended upon the will of the members of the United Nations, and so I come back to my point, the question of the value of the United Nations as an effective instrument of world peace and an effective part of our own foreign policy will depend at last upon our will and upon the will and determination of our allies within the United Nations. We have not failed. It will fail only if those within the United Nations fail to act with the same will and with the same determination.

I want to speak now for a few minutes on another question which has concerned us deeply within the last few months, and that is the question of allies. It has been said that a great many of our people believe that we should go it alone or at least in limited company. A great many of our people believe that our friends and allies may lead us into these involvements, and almost all of our people today believe that our allies are not doing enough to help us in this struggle. I want to address myself briefly to that point.

I would be less than honest if I did not say that I agree with you in respect to the war in Korea that the other members of the United Nations have not done what they should have done. Fifty-three nations did agree and support the first resolutions. Sixteen nations have sent some 30,000 or 32,000 troops to Korea. Forty-three nations are furnishing supplies to help in that fighting, but still I think we must agree that we have done the lion's share and they have not, at least in measure, done as we have done.

There are certain reasons for that, though, which I think we should discuss and which we should understand. Why is it that they have been making such small contributions and why is it that we believe they have not done as much as they should? In the first place, I think it is only fair for you to know that France, for example, has over 160,000 men in Indo-China and has had that number there for much longer than we have had forces in Korea. France has suffered over 30,000 casualties in Indo-China and loses each year, it is stated, its best commissioned officers and non-commissioned officers in that fighting. Curiously enough, Great Britain today has 275,000 men scattered throughout the world, including some 20,000 in Korea, and today is engaged in resisting a Communist uprising in Malaya, and in proportion to their population it is true that they have more men and more troops scattered in sensitive areas of the world than we do, although they do not have the casualties that we have in Korea. You may ask why they have been so slow. I can say this: Upon the basis of my experience last year in traveling for sometime in Europe and in talking to the leaders and the heads of some of the members of the North Atlantic Treaty Organization, notably in England and France and Italy and Belgium and Holland, and then also talking in Western Germany, I have found they give many reasons, reasons why they believe that too active a policy there would prohibit the chances of peace, but it is my conviction that the real reason is because of their exposed nature. I think it is only honest to realize, although we are engaged in actual fighting, that the great bulk of our nation and our people is some 3,000 miles or 5,000 miles away from the possibility of direct aggression against our own continent and against our own people.

These people realize that they are exposed, that they are within mintues or hours of an attack, if it should come, on their borders. They have suffered two occupations. They have seen their leadership destroyed. They have seen their material wealth destroyed. Their civilian population has suffered injuries such as our civilian population has never known, and certainly it does impose upon them a caution, a great awareness against war, which I think is always more closely with them than it is with our own people, and again they are hopeful that in time there is a possibility of building up in Europe a defense which might deter a war and they are afraid that a chain of events might lead into a general war now which would lead to their annihilation. So some of those are the reasons which I think have caused

their caution, and I think it is only fair that we understand them.

Some might ask, "Why doesn't the United States force, in the United Nations or by its own diplomatic processes, these nations to do more?"

First, the United Nations is not a supernatural body. Each government expresses its own national policy. Secondly, in our diplomatic relations I think we must always remember that these people are sovereign nations, and although they rely upon us, that they have problems to deal with before their own electorate just as we have here in this country.

We can look back to last year in this country. It was not until after the general election that we took all the necessary steps that should be taken in this country, and in Europe where the political control is so narrow they must lead more gradually than we do, and there is always the possibility that if they moved too fast or if we should subject them to too great pressure and to too great exertion a government might fall and it might be replaced by a government which would not be the type of government which would adhere to our own aims in foreign policy. Again I think we must consider those possibilities.

Now, to look just for a few minutes to our own policy towards the future and then I am going to close. I remember one other story which I will tell of the old couple in the mountains of Kentucky who had been married some fifty years. One night they were sitting together in front of the fire and as he looked at her he began to think that he had never said to her the kind things that he ought to say, so he leaned over and because she was deaf he said in a very loud voice, "Dear, I am proud of you."

She said, "What did you say?"

And again he repeated it in a much louder voice, "I am proud of you."

Again she said, "I can't understand. What did you say?"

This time at the loudest voice in his command he said, "Dear, I am proud of you."

Then she turned to him and said, "Well, I am tired of you, too." (Laughter).

I think it is very necessary today to make as clear as it is possible to make it clear exactly why it happens that our troops are fighting in Korea. I remember several months ago the letter of some mother who had written to, I think, one of the papers in Washington and she said, "Why is it necessary that my son should fight in Korea?" And I think it is impossible to ever explain to a parent why it is necessary, but it must be explained if our people are to be united.

I have discussed it briefly upon the basis of collective security and our relationship to the world. It was the first test and it is certain that if we had not acted then we would have been faced with this decision maybe in the next two or three months, perhaps this year, or certainly sooner or later we would have been faced with that decision and, I believe, under worsening circumstances. Because there was no place in the entire world where there was a possibility of obtaining as much support as we have been able to obtain in Korea except in the great countries of the world, simply because of its relationship to the United Nations. It happened at that time the United States had the only forces available in the vicinity that were able to be sent. I know it is subject to great argument, but it is my own belief that if there was to be any hope of deterring aggression, as bad as it has been, it was the only decision possible to make. But I do believe that it is necessary that the government of the United States explain in terms of our own interest our foreign policy.

Every witness who testified in the recent hearings in the Congress—General MacArthur and the Joint Chiefs of Staff—testified it was necessary to maintain for the security of this nation this chain of islands in the Pacific. It is certain that they were unprotected and undefended and it is certain that this intervention in Korea has aroused in the minds of our people the necessity of strengthening those defenses which every one of our leaders has said is needed for the defense and security of this country.

First, I will say that after the close of the last war—I will not now attempt to fix the responsibility—it is certain that the dissolution of our armed forces has done more than anything else to bring about the situation which we face today. I doubt that we would have been able to reenforce and reestablish those forces upon the basis that it was needed except for Korea. And at some later time we would have found ourselves stripped and defenseless. Out of this war also has come the conviction that our training and our weapons were not as good as we thought them to be, and there has been a revision of our training and of our

weapons which should serve us instead in the future.

Finally, it may give us time for the building of strength in this country and in Europe and throughout the world to dissuade a greater war.

Again I say you cannot say it to a mother or a father who has lost a son, but those things must come to any nation. They are one of the responsibilities of the nation and it is better, bad as it may seem, to endure this sacrifice if it means that a greater war can be prevented and that millions instead of thousands may be saved.

You may guess from that, and I say this without any criticism of the great General MacArthur who I believe spoke sincerely—I believe that his plan from a military viewpoint was a proper plan and I believe also that he has done a great service by provoking this great debate—that I believe the best we can do at the present is to try as best we can to take no step now which would provoke a greater war.

You may ask me what our purposes are there. You may ask, "What are the chances for peace?" You read the statement of Jacob Malik, and I know that all of us are hoping that something may arise from it, but it is worth while to notice that in this long speech of several thousand words only in the last three paragraphs—the first part of the speech being devoted to the usual attack and abuse on the United States—was there held out this possibility of peace. I say to you that our government should not be too wary and skeptical about it and that they should be willing to examine every avenue and every chance that it proposes, and I think that is the great duty of our government.

The chief purpose has been, as far as this military intervention is concerned, to repel the aggression and to stop it, and if some terms can be worked out which are honorable and which will make our effort worth while, certainly I know that it would be the duty of our government to enter into that effort. I have no further information about it. Yesterday I talked to the State Department and I was told that there was known only what you know. The matter is being thoroughly explored in Moscow between our American Ambassador and Mr. Gromyko, the Foreign Minister of Russia.

The second thing that I think we must do is that, whatever happens in this situation, we must not be deterred from the completion of the job of building an adequate defense for this country. Every time it appears that there may come peace there is the inclination on the part of our people, thinking of takes and thinking of controls, to say, "Well, it isn't needed," and so there is this great inclination to let up. The greatest mistake that we could make would be to let up before a capable defense system was prepared and established in this country, because the stocking of our items is the greatest deterrent in my opinion to the possibility of a general war. That means also for the time being we must continue to contribute to the building of the strength of our allies.

In Europe I found that they do not have the productive capacity now to actually do a great deal. Their margin between economic needs is so small that if they were left entirely on their own resources the entire struggle there might be lost. Today there is a bill before Congress which asks for an appropriation of $8,500,000,000 for military aid to Europe and economic aid. It is a great amount, but if their productive capacity can be organized and started, and if their forces can be constructed and built, it offers the only hope, as I see, of reducing in the future the great burden of armed forces in this country.

As a parallel example, we have spent some $16 or $17 billions on the Marshall Plan in Europe for economic recovery. It did not do the entire job. It stimulated the job, and as a result today some of those countries have completed their programs long before it was proposed. They have taken steps, so it seems to me in the same sense this building of military strength will offer the best chance of their own security and, furthermore, the reduction of the very heavy cost of armaments and men in the future.

One of the last things I want to speak about, something which goes back to what I was talking about a few minutes ago, is that it is an absolute necessity that we continue our efforts to hold the support and the confidence of as many of the free peoples of the world as we are able to. Allies are troublesome; there is no question about it. You only have to read the memoirs of General Eisenhower and General Bradley and other great generals of World War II and World War I to know the tremendous conflicts they had with our allies, but I think we should look at the problem of what we would do in our situation without them.

First, with respect to Korea, if we had

no allies in any formal organization I doubt that we would have ever intervened. If we would have intervened there would have been no moral persuasion to make them comply with aid, as limited as it has been. It is probable that they would have said it had no great significance to them. It is difficult to get along with allies, but I contend it is more difficult to get along without them. It is difficult to consult with them. But it would be worse not to consult with them and then adopt a course of action and find that without consultation there was no support.

Since the war we have spent billions. We have spent the efforts of our government and of our people to build up strength and to hold allies to us. It would be a sad thing if in our resentment and if in our disappointment we adopted some course which would drive those allies away from us, because we need them now. We need them for our defense and we need them in the long struggle ahead for freedom. The great purpose of Russia is to separate us from our allies.

Finally, I think it is necessary for us to adjust our thinking. One of the mistakes I believe the Administration has made—I do not say consciously, but whether consciously, inadvertently, or adherently—has been to hold out to the American people that at the time some great program is proposed it will solve our problems for the future. I think it is only fair for us to recognize that this problem may be with us, not for this year or for next year or for the following years; it may be with us for twenty years, because there is nothing in the history of the Russian philosophy, there is nothing in our experience since World War I, except what they say in their propaganda, which has given any concrete proof of their willingness for peaceful coexistence of the Capitalist and Russian Socialist Systems. I hope that that may change. The best possibility today is not in the belief that we can change their policy, but that we by our acts can adjure them to adjust their policy, but that may be a long, long struggle.

In that struggle it seems to me that, while criticism is necessary—and I hold no brief for the mistakes that have been made —if we are to be successful in this struggle we shall need the unity and the strength of both our great political parties. The chief responsibility is with the Administration because it is charged with the conduct of foreign policy, but there is also a responsibility for both parties. The bipartisan policy does not mean an acceptance of everything that is offered by the Administration, but it means an opportunity to consult about it. It means the opportunity to criticize it. It means the opportunity to get constructive suggestions. The great ability of Senator Vandenberg was not that he accepted the proposals in toto of the Administration, but that he brought to bear upon them the constructive criticism, and they were advised in conformity with the abilities and with the measure of support of the American people. Last year Mr. Dulles, Mr. Lovett, and others served with that same high purpose, and I think it is necessary if we are to win this struggle that we have the great support of both parties as far as possible.

Finally, I believe we have to find again some confidence in our own system and in our own beliefs. We say that we believe in the democratic principle and we say that we believe in the Christian principle upon which it is based, because it is based upon the Christian principle, the importance of the individual. There was a time when we believed in it so strongly in the early part of our history that our influence went throughout the world. I speak of the early part of the Nineteenth Century when as a young nation, free, without the military strength, without great economic strength, but with the strength of our faith and our ideas, we helped bring about freedom in South America and even those countries in Europe from which we had sprung ourselves.

Communism has appealed. It has not done all its work by subversion. It has held appeal to the struggling masses of people throughout the world. By distributing information, as was suggested by the speaker before me, by a demonstration of our own great constructive possibilities—though I believe not particularly in all of the implications of the Point 4 Program —but by a demonstration of our abilities in the fields of agriculture, health, and other fields, as we have demonstrated in our own country, and finally by a demonstration of our own faith in our system, we have the chance to win the great struggle ahead.

I was happy to find out in my trip to Europe during the winter that there was no acceptance of the idea that war was inevitable. There was a belief that we are winning the struggle. I think now if we can bring to it this belief and this faith and

this new effort and inspiration that there is great opportunity of winning the struggle which lies ahead.

I remember, as you do, the great story of Winston Churchill which he called, "Their Finest Hour," and with that language which it seems only he can use he told the story of the British country at a time when it had been driven from Dunkirk, when it was stripped almost defenseless, and when it seemed that it had reached its blackest hour; yet in that moment somehow the British people drew from their inner resources those great resources of determination and of courage and of spirit which enabled them to meet that challenge and to have their finest hour.

Throughout our long history we have spoken of our belief in democracy and freedom. We have held it up as a symbol before the world. We have spoken of our belief in Christianity. We have held out to the peoples of the world that we would not desert them, and surely whatever sacrifices it may take—and I think it will take great sacrifice in terms of money, service, in terms of determination—whatever sacrifices may become necessary, surely this country and its people with its great record and now having reached this position of undisputed leadership in the world, surely it, too, can draw from its resources and it can also have its finest hour. (Applause).

PRESIDENT STICHTER: Thank you, Senator Cooper.

The Executive Committee at its Mid-Winter Meeting unanimously adopted a resolution recommending an amendment to Article III of the By-Laws. Notice was duly given pursuant to Article XVI of the By-Laws that such proposed amendment would be presented for action at this meeting. There being a quorum present, the Chair will no recognize Mr. Franklin J. Marryott, Chairman of the Membership Eligibility Committee and a member of the Executive Committee, who will present this matter for your consideration. Mr. Marryott.

MR. FRANKLIN J. MARRYOTT (Boston, Massachusetts): President Stichter, Members and guests of the Association: Article III of the by-laws as they now stand provides as one of the qualifications for membership in this organization that the applicant shall have devoted a substantial portion of his professional time to the representation of insurance companies for the five years immediately preceding his application for membership. Our experience under the by-law in question indicates that it is not entirely satisfactory. A literal application of the language of the provision seems to us to result in some very inequitable answers on some applications of people that ought to be members of the Association.

The hardship is particularly apparent in three types of cases, all with respect to people who are fully eligible except for one thing, namely, the period of practice has been interrupted. First, we have the cases where people had been in the armed services at sometime immediately preceding the application. Second, we have the case of the man who has been a judge for some time during the five years, fully eligible and who has resigned or otherwise left his judicial office and then applies for membership. Third, we have the case of the people who have been in administrative office, such as Commissioner of Insurance. We have had one or two cases of people fully eligible in every respect who during the five years immediately preceding their application have been Insurance Commissioners or in some such office. It seems to us that these results were not intended and that we ought to make some change.

As President Stichter says, we considered the matter in the Membership Eligibility Committee at the mid-winter meeting. That committee consisted of Mr. Albert, Mr. Gooch, Mr. Stanley Morris, Mr. Spray, and myself. Our conclusion was that there should be a change and we so recommended to the Executive Committee and the Executive Committee agreed with us, so there is a unanimous recommendation on the part of the Executive Committee that Article III be amended.

The pertinent portion of the article as amended would read:

". . . and who devotes and has devoted for five years preceding his application for membership a substantial portion of his professional time to the representation of insurance companies. . . ."

The change consists merely of the deletion of two words, the word "the" before the words "five years" and the word "immediately" which precedes the word "preceding."

As President Stichter has noted, the by-laws may be changed at any annual meeting by the affirmative vote of at least two-thirds of the members present and voting, provided there be not less than fifty members present. There appears to be more than fifty members present. Proper notice has been given by publication in the Journal. It appears on page 95 of the April issue. Therefore, Mr. President, I move the adoption of the amendment.

PRESIDENT - ELECT JOSEPH A. SPRAY (now presiding): Do I hear a second?

MR. W. PERCY McDONALD (Memphis, Tennessee): Mr. Chairman, I wish to second the motion. I had occasion to discuss last night with Mr. Marryott briefly an application that had been submitted which I endorsed and was turned down. We felt that this boy had been in the armed services for a period of time where the five years might come into it. There are other considerations that go into that application, but realizing from actual experience the necessity for change, I would like to second that motion.

PRESIDENT-ELECT SPRAY (Los Angeles, California): Thank you, Mr. McDonald. Is there any further discussion?

MR. CLINTON M. HORN (Cleveland, Ohio): I wish to amend the proposed amendment by making it retroactive to January 1, 1951 in order to take care of just such a case as was mentioned.

PRESIDENT-ELECT SPRAY: I do not think your motion to amend is in order, because in order to do that under the by-laws we would have to give notice.

MR. HORN: It is germane and relevant to the proposal before the house.

PRESIDENT - ELECT SPRAY: The present chairman would like some legal advice.

MR. GEORGE W. YANCEY (Birmingham, Alabama): I do not believe there would be anything to be accomplished by the amendment for the reason that if the by-laws are amended today any pending application that has not been acted upon can be resubmitted and acted upon Saturday.

MR. HORN: If that be true, I withdraw my proposal.

PRESIDENT-ELECT SPRAY: Is there any further discussion? Do I hear any question?

A MEMBER: Question.

PRESIDENT-ELECT SPRAY: All those in favor say "Aye." Opposed, "No."

The amendment is carried.

PRESIDENT STICHTER: At this point in the program I should like to ask Pat Carey to come forward. Pat Carey is chairman of the General Entertainment Committee and he will make an announcement which I had previously scheduled Mr. Ari M. BeGole to make. Mr. BeGole is chairman of the Reception Committee for New Members. Mr. Carey.

MR. L. J. "PAT" CAREY (Detroit, Michigan): The reason for this substitution is that Mr. BeGole has stationed himself outside the door in order to catch all of the new members when they get their green badge. He is trying to corral them so they will be present for the introduction of new members. Mr. BeGole is chairman of that committee and he, a little later in these proceedings this morning, will bring before the convention here the new members who have just been enrolled this past year, and he will introduce them to you. He has asked me to say to all of the new members who are here that he wishes very much that they remain here until that procedure takes place.

There is another announcement to be made at this time and that is the announcement with reference to the first event for the ladies today, which is at 12:15. That is the reception for ladies who are attending the convention for the first time. That reception is being held in the Trellis Lounge at 12:15 today and then the ladies will all eat together in the main dining room. Also I would like to announce for the benefit of the ladies that this afternoon our very gracious first lady is holding a sort of open house in the presidential suite for all the ladies between 2:30 and 4 o'clock. She says that she hopes none of them will come with the expectation of getting anything to eat or drink, (laughter) but she will be there and will be glad to show them through the presidential suite which is located at the end of the long hall, past the Old White.

PRESIDENT STICHTER: Thank you very much, Pat.

Upon looking at your program it may seem to you that we have a lot of work ahead of us this morning. We do have, but I think we can clear it very promptly

if you will give us your attention, please. We are going to have another report.

Ladies and Gentlemen, this Association is indeed most fortunate in having a capable, diligent, and dependable Secretary, and I mean just that. John Kluwin has rendered yeoman service in that capacity. I have thoroughly enjoyed working with him. We will now hear his report, as Secretary. Mr. John Kluwin. (Applause)

Report of Secretary, John A. Kluwin

Milwaukee, Wisconsin

MANY and varied have been the problems to be solved in your Secretary's office since we met a year ago here at The Greenbrier. With the aid of your President, the members of the Executive Committee, and with your kind cooperation they have all been solved.

The most preplexing problem has been our attempt to accommodate all who desired to come to this convention. It reached a climax in the past two weeks when we were trying to take care of those on the waiting list. If by chance you wound up with a partner not of your own choosing and it has turned out to be a happy association, I accept full credit. If, however, anyone is mismated, I deny all responsibility and assert that the arrangement is purely coincidental.

Our membership at the present time totals 1,441 as compared to 1,416 a year ago. Since our last meeting we have admitted 81 new members, and 2 members were reinstated. There have also been 21 resignations, 13 deaths, and 19 members have been dropped for nonpayment of dues. We also have 21 applications for membership in various stages of processing.

The following figures may seem staggering to you, but the fact remains that in excess of 6,000 letters were written and more than 4,000 received by me during the past year in connection with the transaction of your Association's business. The time consumed in merely reading and answering this correspondence—let alone the other work incident to the same—is terrific. I mention these facts merely to give you some idea of what goes on behind the scenes.

If you have any questions about the operations of the office of your Secretary, I shall be only too happy to try to answer them for you.

Respectfully submitted,
JOHN A. KLUWIN
Secretary

(Applause)

PRESIDENT STICHTER: Thank you, John Kluwin.

We are equally fortunate in having a capable and dependable Treasurer, one who is both circumspect and Scotch when it comes to finances, a veritable watchdog of the treasury. Mr. Forrest Smith, we will be glad to have your report at this time. (Applause)

Report of Treasurer, Forrest S. Smith

Jersey City, N. J.

Balance at Oct. 31, 1950:			
Cash:			
On demand deposit ($3,160 registration fees for 1951 Convention included)		$ 3,531.75	
United States Bonds:			
Defense Series G:			
Maturing February 1954	$ 5,000.00		
Maturing February 1955	10,000.00	15,000.00	$18,531.75
Receipts:			
Dues	$20,625.00		
Registration fees for 1951 Convention	940.00		
Subscriptions to Journal	231.54		
Fees, applications for membership	930.00		
Interest on "G" Bonds	187.50		
Miscellaneous, sale of typewriter by Secretary	72.50	$22,986.54	
Disbursements:			
Secretary's office expense	$ 2,934.38		
Treasurer's office expense	809.73		
Refund, registration fees to Convention	175.00		
Refund, application fees	165.00		
Journal expense	3,862.40		
Convention expense 1951	337.83		
Mid-winter meeting 1951	4,989.92	13,274.26	
Excess receipts over expenditures for period			9,712.28
Balance at 6-15-51			$28,244.03

Accounted for as follows:		
Cash:		
On demand deposit		$13,244.03
United States Bonds:		
Defense Series G:		
Maturing February 1954	$ 5,000	
Maturing February 1955	10,000	15,000.00
		$28,244.03

PRESIDENT STICHTER: Thank you very much, Forrest.

Members of the Association, John Kluwin is now completing his second full year as Secretary and Forrest Smith his fourth consecutive year as Treasurer. Both of these men have given most generously of their time. They have been most faithful and efficient in the discharge of their respective duties. Their jobs involve a multitude of details, and it takes quite a few months before a new Secretary or a new Treasurer can begin to operate at top efficiency. For that reason, and it is a good one, it has been the custom of this Association in the past to re-elect from year to year its Secretary and Treasurer. However, the work entailed in each of these jobs is sufficiently burdensome that we ought not impose for too long a time upon the services of any one man holding either office.

Your Executive Committee has felt that we should not ask any man to serve in the office of either Secretary or Treasurer for a period of more than five years, and both Secretary Kluwin and Treasurer Smith fully concur in their view. As a matter of fact, the Executive Committee last year, at the suggestion of Mr. Kluwin and Mr. Smith adopted a resolution to the effect that no member should hold the office of Secretary or Treasurer more than five years. I mention these facts because I feel it is time for the members to begin to think about a successor to Forrest Smith when his five years of penal servitude shall have ended next year, and the same is true with respect to John Kluwin when he shall have served out his sentence, even though John is still a youngster in point of service as Secretary.

The next item on our program is the Report of the Memorial Committee. That report will be given by its chairman, a past president of our Association, Bill Baylor, of Lincoln, Nebraska. Bill, will you come forward?

Report of Memorial Committee

F. B. BAYLOR, *Chairman*
Lincoln, Nebraska

UPON the opening of this assembly we sadly note that during the year since last we met, the call of death has been answered by valued members of this association.

On memory's canvas we see them as forceful advocates, able counsellors and creative leaders where ever they chanced to be, and as faithful friends of us all. Of each we say, in the words of Edward Young:

"Whose work is done; who triumphs in the past;
Whose yesterdays look backwards with a smile."

Their lives and accomplishments prompt in us the thought:

"So let the way wind up the hill or down,
O'er rough or smooth, the journey will be joy:
Still seeking what I sought when but a boy,
New friendship, high adventure, and a crown,
My heart will keep the courage of the quest,
And hope the road's last turn will be the best."

Henry van Dyke

Those whose names now must be inscribed on the Memorial Rolls are:

Robert A. Adams, Indianapolis, Indiana
Howard D. Brown, Detroit, Michigan
Louis L. Dent, Chicago, Illinois
Gaines Hon, Los Angeles, California
Fred D. Hamrick, Rutherfordton, North Carolina
J. R. Kiplinger, Rushville, Indiana
Arthur H. Laws, Denver, Colorado
David I. McAlister, Washington, Pennsylvania
John J. McKay, Miami, Florida

Walter McNett, Ottumwa, Iowa
Stevens T. Mason, San Marino, California
Arthur A. Moreno, New Orleans, Louisiana
J. H. Skeen, Baltimore, Maryland
Walter Stover, Watertown, South Dakota
Sam D. Thurman, Salt Lake City, Utah
Maurice H. Winger, Kansas City, Missouri

Let us stand in silent acknowledgement of the loss which we have sustained and in reverence for those who have passed beyond.

Mr. President, the committee regretfully submits its report.

F. B. Baylor, Chairman
Oscar J. Brown
Milo H. Crawford
J. Roy Dickie
Gerald P. Hayes
Paul J. McGough
Harlan S. Don Carlos, Ex Officio

PRESIDENT STICHTER: Thank you, Bill, for a beautiful service.

I shall now recognize Mr. George W. Yancey, of Birmingham, Alabama in order that he may give his report as Editor of the Insurance Counsel Journal. Mr. Yancey.

Report of Editor, George W. Yancey

Birmingham, Alabama

Mr. President, members of the Association: First I want to present to you as a token of appreciation of the members of the Association a set of bound volumes of Insurance Counsel Journals, and I hope you will display them here so that the members may see just how the Journal looks when bound.

Second, I want to thank each of you who has assisted Miller Manier and me during the past year, and I want to thank also those who did not assist because we expect your assistance during the ensuing year. I also want to say this: We have never paid for any articles or contributions to the Journal and the Journal is just as good as you make it by your contributions.

(Applause).

PRESIDENT STICHTER: Thank you, very much, George.

I will open up this package of bound volumes and I thank you very, very much for them.

I have already advised you that the annual reports of all of the thirteen standing committees have been filed. These reports will be published in due season in the Insurance Counsel Journal, and consequently it will not be necessary to ask the chairmen of these committees to make any oral report at this time. However, I think that all of you should have the opportunity of knowing the chairmen of these thirteen standing committees whose accomplishments this year have been truly outstanding. As their names are called I should like those who are present to stand and take a bow.

First, Mr. Paul F. Ahlers, of Des Moines, Iowa, Chairman of the Casualty Insurance Committee. (Applause)

Mr. Taylor Cox, of Knoxville, Tennessee, Chairman of the Highway Safety Committee. (Applause)

Mr. James Dempsey, of White Plains, New York, Chairman of the Automobile Insurance Law Committee. (Applause)

Mr. Harlan Don Carlos, of Hartford, Connecticut, Chairman of the Health and Accident Insurance Committee. (Applause)

Mr. John P. Faude, of Hartford, Connecticut, Chairman of the Financial Responsibility Committee. (Applause)

Mr. George P. Gardere, of Dallas, Texas, Chairman of the Workmen's Compensation and Unemployment Insurance Committee. (Applause)

Mr. Charles P. Gould, of Los Angeles, California, Chairman of the newly-created standing committee this year on Malpractice. Mr. Charles Gould. (Applause)

Mr. Gould is not here, but I should say that for a starter this committee did a whale of a job and I am sure that it more than justified its existence. I know that we are going to benefit a great deal from that committee in future years.

Mr. Ambrose B. Kelly, of Providence,

Rhode Island, Chairman of the Fire and Inland Marine Insurance Committee. (Applause)

Mr. William E. Knepper, of Columbus, Ohio, Chairman of the Practice and Procedure Committee. (Applause)

I do not see Bill present, but I just want you to know that one of the finest standing committee jobs that has ever been done is this manual which Bill Knepper and his committee prepared on Survey of Discovery of the Federal Rules of Civil Procedure, a truly outstanding work.

Mr. Stanley B. Long, of Seattle, Washington, Chairman of the Marine Insurance Committee. (Applause)

I might say at this point that the train that was scheduled to arrive here this morning to bring many of our members is three hours late and has not yet arrived. That may account for the absence of some of the people that I have mentioned.

Mr. Walter A. Mansfield, of Detroit, Chairman of the Fidelity and Surety Law Committee. (Applause)

Mr. George Orr, of New York City, Chairman of the Aviation Law Committee. (Applause)

Mr. Joseph R. Stewart, of Kansas City, Chairman of the Life Insurance Committee. (Applause)

That completes the roll call and now for some more announcements. Is Mr. Carey present?

MR. CAREY: I am still here. Mr. President, and Ladies and Gentlemen: I think I can report for perhaps several of these committees because they have asked me to do so. That will include the Ladies' General Entertainment Committee, under Mrs. Milton L. Baier; The Ladies' Bridge Committee, chairmaned by Mrs. George Schlotthauer; and I believe I will also be speaking for Mr. H. Beale Rollins, of the Men's Bridge Committee unless he is in the room and cares to be heard.

The announcements in connection with the General Entertainment are as follows: The first event I announced to you a few moments ago, the reception for the wives of new members, and in fact the reception for all of the ladies who are first attending the Convention. Then this evening at 6:30 in the Spring Room and Terrace is the President's reception. The committee, I believe, is quite anxious that all of you attempt to cooperate in going through the receiving line as fast as you can and that you do not stop to tell about how Aunt Susie broke her back last week or talk about those grandchildren of yours with members of the Committee. (Laughter) Those in the receiving line would like to get a drink too.

Dinner this evening is no set affair, so make up your own parties and eat where you care to.

This evening at 9 o'clock we are going to try an innovation and I am not sure how it is going to work out. I enter into this with a little fear and trepidation because of several things. In the first place, we are trying something new. We are using this room, having it set up in cabaret style. The Association will be formed into a club for the purpose of selling alcoholic drinks here under the name of the Association or the Club, and we will have our own bar here. The drinks will be 75 cents each. We have made no determination yet as to what we will do about Cokes, but such things as that kind will be taken care of. However alcoholic drinks of any kind will be 75 cents. This will include your tips. There will be no tips given to any of the waiters. This charge is made in an attempt to cover some of the expense of this part of the entertainment. It covers the cost of the liquor, the set-ups, the glasses, the ice, the soda, the ginger ale, the waiters, the gratuities that I spoke of, and we hope out of that to have something left to pay for some of the music that we will be having here.

Tonight there will be no dancing in the main dining room as the hotel orchestra is off duty, so we have engaged the Don Osborne Orchestra, Charleston, who will be here to play for us and we will have a portion of this room, a comparatively small portion of course if we are going to have tables for everyone, set aside for dancing. So between 9 and 10 o'clock this evening the program will consist mainly of dancing. After that time no one knows what is going to happen, including myself.

Feeling that I was getting kind of old and decrepit and should be sitting on the porch and taking it easy, the President this year took pity on me and said that he would appoint two vice-chairmen who would give me ample support and I would have practically nothing to do whatsoever, so he decided to furnish the porch for me

and he used a little porch furniture and he gave me a Reed and a Wicker (laughter), and Peter Reed, from Cleveland is one of the vice-chairmen and he was given the job of promoting the entertainment for these two evenings in the International Cabaret. However, unfortunately, he will have to leave here this afternoon or evening; however he has done a lot of work in getting it organized and I think it will go. Who knows? Mr. Wicker has also given me a great deal of assistance. However you can see that the porch furniture is sort of beginning to fall to pieces already, because Mr. Wicker did not get here until this morning, although he was due in yesterday. I hope that all you people will enter into the spirit of this thing and also take pity upon us. We are trying to arrange it for the first time. We can only seat about 400 people in here, and of course we have more than that in attendance at the Convention, but we do not expect them to be here all at one time and we expect some coming and going, so I think we may be able to get by and not have it too crowded.

I hope none of you feel that that charge for the drinks is too much. As a matter of fact, if you go in the Old White Club you have to pay 50 cents for the set-up alone and then furnish your own liquor, so at least it is cheaper than that and it includes your gratuities. We hope the entertainment in addition to the orchestra will be good.

I might just as well say, while I am on that subject, that tomorrow night we will also operate this room as a cabaret and, while we will not have a full orchestra in here because of the fact that there will be dancing in the ballroom and the orchestra of the hotel will be playing in there, we will have other types of entertainment going on in here, other types which I hope will be performed mostly by some of you people. So at this time I make an appeal to you that any of you who have talent—or perhaps the appeal should be made to all of you to select someone that you know has talent—please remember us. In other words, each of you pick out the other fellow to do the job and tell us about it. Tell Peter Reed or John Wicker or me to day if you know of anyone who has talent that you think should be exposed to full view before this audience during the cabaret period, and be sure to make that report as early as posible so that we can arrange the program.

The Ladies' Bridge and Canasta party is tomorrow at 12:45 and is now scheduled for the Casino, and the ladies hope to have it there. If the weather is bad and raining by 10 o'clock in the morning the party will be held here in the Trellis Lobby and an announcement will be made on the bulletin board. If there is any question whether it is a bad day or not, the ladies should call the clerk perhaps and ascertain where this luncheon is scheduled. But we hope, weather permitting, that it can be held down at the Casino at 12:45, and after the luncheon they will play bridge and canasta.

The Men's Golf Tournament is on tomorrow afternoon, but I have not yet had an opportunity to see the chairman. Has anyone seen the gentleman around? Is he in the room? Is Pat Eager in the room?

MR. PAT H. EAGER, JR. (Jackson, Mississippi): Yes, I'm here. I have been here all the time.

MR. CAREY: I just thought if the golf prizes are here they should be displayed down in the Sports Room. I will now speak in behalf of Beale Rollins. The Men's Bridge Committee will sponsor the men's bridge tournament tomorrow afternoon at 2:15 in the Trellis Lounge and Beale has selected some very beautiful prizes and they are on display in the lower level in the window of the Sports Shop, and those of you who have a hankering for bridge can look at those prizes.

At 6:30 tomorrow night the usual affair, the Humble Humbugs' Mint Julep Party will take place. Leo Parker asked me to say that their very beautifully designed formal invitations have not all been distributed, but that does not make any difference; you are still all invited to the Humble Humbugs' Mint Julep Party tomorrow night at 6:30.

The Annual Banquet will be tomorrow night in the dining room at 8 o'clock and except for the tables for the Executive Committee and for the Past Presidents everyone can choose his own method of being seated, and if you will see Mr. Wagner in the dining room regarding any special seating arrangement you want, you can arrange that with him.

Again, after the Annual Banquet tomorrow night comes the International

Cabaret, when we hope we will be open for business again.

Thank you.

PRESIDENT STICHTER: Thank you, Pat.

I am going to call on the Secretary for an announcement that he has.

SECRETARY KLUWIN: May I call your attention to the fact that we have been requested to ask you that when you change from the summer clothes that you are wearing to those rented suits that you put on in the evening that you also change your badges. You have been most cooperative in wearing the badges at all times during the day, but sometimes some of us forget to change them over at night, and I can only add that our eyesight and that of the other members here is not as good at night as it is in the daytime, and we have tried to make the names on the badges as large as possible so they can be seen at least at shooting distance. So we ask your cooperation again, please.

We also ask that the ladies, when they put on their finery, put on the badges. If they do not want to mar their lovely dresses we would appreciate their attaching the badges to their purses.

I also want to call your attention again to the memoranda which were provided for you when you came in, both for the ladies and for the men, on the matter of tipping. You will recall that tipping has been arranged for on your bills in respect to the services in the dining room, both here in the hotel and also down at the Casino, and, I believe, also in respect to the rooms.

PRESIDENT STICHTER: That is right.

SECRETARY KLUWIN: Be sure to put on your card when you sign for service in the dining room that you are with the International Association, so that you will not run into any difficulty with the waiters or the waitresses.

PRESIDENT STICHTER: I might just add that if you put IAIC on the top of your order in the dining room the waiters and waitresses will understand there will be no cash tip. That will be on your bill.

The next announcement is by Mr. Lester P. Dodd, the Chairman of the Open Forum Committee.

MR. LESTER P. DODD (Detroit, Michigan): Mr. President, my announcement can be and will be very brief, since the Open Forum Programs are set forth rather fully in your program. I just want to be sure of one thing: I notice that Mr. Carey announced at least fifteen or twenty events that are going to take place this evening. Since I have been down in this country I have discovered that evening is anytime after high noon, so I might say that the first Open Forum today will take place at 1:45 this evening in this room, and it is the type of program having to do with Pre-trial Practice and I am sure none of you will want to miss it. It is the type of program that involves, among other things, the conduct of a model pre-trial conference, so that it is not the type of thing that lends itself very readily to straggling in when it is half over or wandering out before it is completed. The people that have developed this program have worked very hard. I ask you, in courtesy to those people and in justice to yourself, to try to be here promptly at 1:45, and I am sure we will have a program for you that you will all appreciate.

There will be two Forums this evening, the second starting at 3:15 in this room. We have followed the practice of setting up these forums to follow each other so that there will be no competing forums taking place, that is, no two forums taking place at the same time in different rooms. As a result, we have timed these programs very carefully. We can asure you that they will not run over into your entertainment time, but in order to prevent that it is absolutely necessary that we start promptly so that we may finish promptly.

Tomorrow morning we will have two additional forums, the details of which are set forth in your program, and again, in order to get those forums through in time to allow you to make the golf tournament on time, it will be necesary for us to start promptly at 9 o'clock, and I ask your cooperation in that respect.

Thank you. (Applause)

PRESIDENT STICHTER: I might just add that you have a real treat in store for you at all of these forums. They have been extremely well planned and prepared and I know they are going to be very well executed.

Our President-Elect, Joseph A. Spray, of Los Angeles, California, has an announcement or two to make. Joe.

PRESIDENT-ELECT JOSEPH A. SPRAY (Los Angeles, California): The thirteen standing committees appointed by me will meet at two o'clock on Saturday. I would respectfully request that the chairmen of these various committees communicate with the other members and arrange to have as many in attendance as possible. I also wish to tell you that the Annual Convention for next year will be held at Lake Placid, New York, on June 17, 18, and 19. I understand that the Club has accommodations for a thousand people, so you will all be well taken care of. Further details will appear in the Journal. (Applause)

PRESIDENT STICHTER: I might say that your reservation for next year should not be made with the Secretary, as we are working out a new system on that, and consequently I suggest that you do not write to your Secretary about any reservation. You will get an announcement in due season. The manager of the Lake Placid Club has assured us of very ample accommodations, and I understand they can take care of up to a thousand people and we have never had as many as 700 at a convention yet, although I am hopeful that we will do that this year.

I shall now call upon Ari M. BeGole, of Detroit, Michigan, Chairman of the Reception Committee for New Members, to proceed with the introduction of those gentlemen who during the last year were elected to membership in our Association. There were eighty-one of them elected. I do not know how many are present. Mr. BeGole.

MR. ARI M. BeGOLE (Detroit, Michigan): I do not know how many we have. When I came in here a short time ago we still had ten that were not registered. I assume that is because the train is late. As I call your name will you please come forward?

H. Ellsworth Miller, Chief Claim Attorney of Maryland Casualty Company, Baltimore, Maryland.

George L. Mitchell of the law firm of Mitchell and Thompson, London, Ontario, Canada.

Bert H. Lane of Yonge, Beggs and Lane, Pensacola, Florida.

John H. Jackson, Assistant General Attorney of the Claim Department of the Fidelity & Deposit Company of Maryland, Baltimore, Maryland.

Kraft W. Eidman of the firm of Fulbright, Crooker, Freeman & Bates, Houston, Texas.

J. Hallman Bell of Corn and Bell, Cleveland, Tennessee.

John M. Dalton of Kennett, Missouri.

A. C. Epps of Christian, Barton, Parker & Boyd, Richmond, Virginia.

John Murphy of Tucker, Murphy, Wilson and Siddens, Kansas City, Misouri.

Samuel O. Carson of Walton, Hubbard & Schroeder, Miami, Florida.

Edward H. Schroeder, Assistant Vice-President, Allstate Insurance Company, Chicago, Illinois.

Russell N. Pickett of Pickett and Pickett, Trenton, Missouri.

R. Emmett Kerrigan of the firm of Deutsch, Kerrigan & Stiles, New Orleans, Louisiana.

Lewis W. Sanders, General Counsel for the Kansas City Fire and Marine Insurance Company, Kansas City, Missouri.

Eldon V. McPharlin of the firm of Anderson, McPharlin & Conners, Los Angeles, California.

Cutler May of the firm of May, Simpkins, Young and Rudd, Richmond, Virginia.

William J. Jones of the firm of Lacey, Scroggie, Lacey & Buchanan, Detroit, Michigan.

H. Bartley Arnold, Jr. of the firm of Wright, Harlor, Purpus, Morris & Arnold, Columbus, Ohio.

Harold Scott Baile, Associate General Counsel of the General Accident, Fire & Life Assurance Corporation, Philadelphia, Pennsylvania.

William W. Davis of the firm of Davis and Farley, Cincinnati, Ohio.

Paul R. Erickson, Assistant General Counsel of the Detroit Automobile Inter-Insurance Exchange, Detroit, Michigan.

Arthur Kline of the firm of Kline and Kline, Cheyenne, Wyoming.

Vance V. Vaughan, Brentwood, Maryland.

R. A. Wilson of the firm of Underwood, Wilson, Sutton, Heare & Boyce, Amarillo, Texas.

Mr. President and members of the Association: On behalf of the Reception Committee, it is indeed a pleasure for me to

introduce these new members to you. Thank you. (Applause)

PRESIDENT STICHTER: Just a moment, please, while we have pictures taken. (Pictures are then taken.)

I am sure that our old members gazing upon your sunny countenances will readily agree that we hit the jack pot when we secured such a fine group of novitiates as are here assembled this morning. We welcome you into the International Association of Insurance Counsel where you will find the ablest of lawyers, the best of good Joes, and the most charming of ladies. What more could you ask? We want you to feel that you are now, and we want you to be now and henceforth, an integral part of our Association. We want you to have and enjoy all the rights, privileges, benefits, and prerogatives which apply to membership. At the same time we hope and expect that you will assume and faithfully discharge all the correlative duties of membership, that is to say, that you will become a working member and as such undertake and carry out *your* share of our Association work. And may I venture to say to you that the pleasure and benefit which you will derive from your membership in our Association will, in a great measure, depend upon the extent of your participation in the work of the organization.

Again, I say to you, welcome, good luck, and happy days. (Applause)

PRESIDENT STICHTER: Article VIII of the By-Laws requires the President at the first session of each annual meeting to appoint a Nominating Committee of five members of the Association to make and report to the Association nominations for the offices of president-elect, two vice-presidents, a secretary, a treasurer, and members of the Executive Committee to succeed those whose terms are expiring.

There are to be nominated and elected this year three members of the Executive Committee, each for a term of three years. As Article VII of the By-Laws provides that no two members of the Executive Committee other than officers—and I am referring to those who are elected to three-year terms—shall be residents of the same state, and as the states of Illinois, Kentucky, Michigan, Nebraska, Texas, and West Virginia have three-year term representatives on the Executive Committee whose terms are not now expiring, it follows that Association members from the states of Illinois, Kentucky, Michigan, Nebraska, Texas and West Virginia are ineligible for consideration for this year for three-year memberships on the Executive Committee. They are not however ineligible for consideration for other offices. I shall now appoint as the five members of the Nominating Committee the following:

Chairman, and past president of this Association, Kenneth P. Grubb, of Milwaukee, Wisconsin. Will you come forward, and will the others whose names are now called come forward?

Milton A. Albert, of Baltimore, Maryland;

Franklin J. Marryott, of Boston, Massachusetts;

L. Denman Moody, of Houston, Texas; and

Denis McGinn, of Escanaba, Michigan.

I wonder if one of you in the back of the room would ask at the Secretary's desk to have Milton Albert and L. Denman Moody come in, if they can be found. Will one of you try to do that?

Members of the Association, work on the Nominating Committee is always a difficult assignment. The job requires of each member of the Nominating Committee a great deal of time and effort, good judgment, and conscientious consideration. I know that this committee will fully measure up to its responsibility. To the members I wish to say that it is not only your privilege, but your duty, to let these members of the Nominating Committee know of your wishes with respect to the selection of men to run this organization. Your recommendations to them should be based upon your own considered judgment and honest opinion of the ability and willingness of the men whom you suggest—ability and willingness which has been demonstrated through previous service to our Association.

Mr. Chairman, in order to assist you and your committee I have prepared and shall deliver to you a list of those members who have already served our Association either as an officer or as an executive committeeman. I shall also furnish you with a list of those members who have been in attendance at one or more of the Conventions of this Association held during the past five years. Arrangements have been made, Mr. Chairman, for the Nominating Committee

to use the Chesapeake Room. To get there, you start for the liquor store (laughter) and turn left. It is near the Riding Office where the horses take off. Mr. Chairman, I am sure that members of our Association would appreciate your advising them now as to the time of the meetings of your Nominating Committee. Mr. Kenneth P. Grubb.

MR. KENNETH P. GRUBB (Milwaukee, Wisconsin): President Stichter and Gentlemen: We will go in session following the Open Forum this afternoon and will be in session practically at all times when there is no other Association business going on. We would very much appreciate it if you will come in and give us your advice and let us know your desires—and be sure to come early.

Denis McGinn just asked me to announce that instead of going by that liquor store, stop in and bring a bottle.

PRESIDENT STICHTER: When you say "following the Open Forum," what time do you have in mind?

MR. GRUBB: About fifteen minutes after the Forum.

PRESIDENT STICHTER: Before we adjourn let me remind you of the excellent Open Forum programs this afternoon, the first of which starts at 1:45 p. m., and those of tomorrow morning beginning at 9 o'clock a. m.

This first general session is now adjourned until Saturday, June 30, at 9 o'clock a. m. sharp.

(Thereupon at 12:50 p.m., Thursday, June 28, 1951, the General Session was recessed, to reconvene at 9 o'clock a. m., Saturday, June 30, 1951.)

OPEN FORUM

24th Annual Meeting of International Association of Insurance Counsel
Chairman: LESTER P. DODD, *Detroit, Michigan*

Practice and Procedure Committee

Chairman: WILLIAM E. KNEPPER, *Columbus, Ohio*

SUBJECT: PRE-TRIAL PRACTICE

THURSDAY AFTERNOON SESSION
June 28, 1951

The first Open Forum of the Twenty-fourth Annual Convention of the International Association of Insurance Counsel, held in the Auditorium of The Greenbrier, White Sulphur Springs, West Virginia, convened at 1:45 p. m., Lester P. Dodd, Chairman of the Open Forums Committee, presiding.

CHAIRMAN DODD: May I have your attention, please, ladies and gentlemen?

I regret very much that the morning's program went overtime sufficiently that even now many of our people have not been able to finish their lunch, but on account of the full program that we have this afternoon it seems necessary that we get started.

This first forum, as you all have noted from your program, is being presented by the Practice and Procedure Committee under the chairmanship of William Knepper of Columbus, Ohio. Before someone raises the question that the several forums that we have listed for today and tomorrow appear to be a little bit top-heavy with Michigan talent, let me say that I was taxed with that in the Executive Committee yesterday and the only truthful answer that I could give to that accusation was that if you want talent you have to go where talent is.

I take pleasure at this point in turning the meeting over to William Knepper, Chairman of the Practice and Procedure Committee, who has very ably and with the expenditure of a great deal of time and energy put this program together. Mr. Knepper. (Applause)

MODERATOR KNEPPER: Thank you, Les.

You can imagine what it means to an

Ohioan to hear a Michigander make that kind of remark about talent. Believe it or not, I think we can demonstrate as we go through the first panel that this is almost a Michigan-Ohio program. When you look at the list of speakers you are going to tell me that one of them comes from neither state, but I will try to explain that as we get to it.

The material that has been passed out to you has been prepared and has been furnished to us here through the courtesy of Judge Lederle, who is going to preside over our Pre-Trial Demonstration, and as you have an opportunity later to go through it I think you will find some very worth-while material in it. Our committee takes no credit for that. That is entirely from Detroit and from Judge Lederle. We are talking about pre-trial, a somewhat abused term and frequently abused practice. Some of us know practically nothing about it. Others have had a great deal of experience. What we are going to try to do this afternoon, first, is to present a pre-trial demonstration. It will deal with three cases, the two that are mentioned in your list there and then a third case, Jones against General Motors Corporation and Smith, which I can assure you is fictitious from the outset. One of the participants said that if that case was ever litigated he would much rather be the plaintiff than counsel for either side, and I think you will see why when we get to it.

We are going to simulate in a very rough form a courtroom, because Judge Lederle conducts pre-trial in the courtroom to a great extent in his court.

Presiding is the Honorable Arthur F. Lederle, Chief Judge of the United States District Court for the Eastern District of Michigan, in Detroit. He was a school teacher for nearly thirty years. He was a practicing lawyer. He was an Assistant City Corporation Counsel of Detroit, and an Assistant Michigan Attorney General. He is now a member of the faculty of the Wayne University Law School. He has been a United States District Judge since 1936 and has been Chief Judge since 1948. We are exceptionally fortunate to have him here for another reason, and that is that he has been one of the pioneers and one of the most actively interested of the judges in pre-trial.

The lawyers appearing in the case are G. Cameron Buchanan, of the firm of Alexander, Cholette, Buchanan, Perkins & Conklin, in Dertoit, who is counsel for the Greyhound Lines and numerous insurance companies; and George H. Cary, a member of the firm of Cary & BeGole, of Detroit, who is likewise counsel for many insurance companies and a specialist in trial practice. You will see them appear in their respective positions as counsel for the parties.

Now, Judge Lederle, if you will take your place and Mr. Buchanan and Mr. Cary will take their places, we will go ahead with our pre-trial demonstration.

I give you Chief Judge Lederle. (Applause)

HONORABLE ARTHUR F. LEDERLE (Detroit, Michigan, Chief Judge, United District Court for the Eastern District of Michigan): The court is now in session.

As a preliminary, Mr. Knepper, I want to thank you very much for your very kind invitation, and I hope that I can live up to your advance notice. I want to also say that I do not deserve any credit for getting together this mimeographed material. A combination of two things, a severe head cold and a number of problems that I had to take care of, prevented me doing very much in the way of preparation. Credit for that should go to Mr. Cary and Mr. BeGole and to my law clerk, Miss Ruth E. Riddell. They got the material together with the thought that it might be some help to you in following our program.

From now on this is going to be strictly court. We are going to try to put this on exactly as it would happen in court, and in reference to the first two cases, exactly as it did happen. You will note that Mr. Buchanan was actually the attorney in one of the cases that is involved here. The attorneys are prepared so that it will be, I think, almost exactly as it was carried out originally.

As I said, the court is in session. It is my practice to call the cases myself. I want to get the tough ones out of the way first. We have two tough ones here, so we will get those out of the way first.

THE COURT: We have the matter of the Hoosier Casualty Company against Chimes and others.

Is the plaintiff ready?

MR. CARY: Plaintiff is ready, your Honor.

MR. BUCHANAN: Defendant is ready, if the Court please.

THE COURT: Gentlemen, as I understand your case here the plaintiff is the insurer of Chimes and is seeking a declara-

tory judgment to determine its responsibility for defending an action that it anticipates will be brought against the insured Chimes or has already been brought and growing out of a collision between one of the trucks owned by Chimes operated by the defendant, Richard Austin, in which the remaining parties claim damages, the Rhode Island Insurance Company being in there as a subrogee. The insurer, Hoosier Casualty Company, claims that they have neither any obligation to defend the suit or any obligation to pay any judgment that may be rendered because at the time the accident occurred the defendant, Austin, was operating the car on his own personal affairs and completely outside of the scope of his employment.

Is that about your case, Mr. Cary?

MR. CARY: Yes, your Honor, that is approximately the case that we have presented here today, and in respect to that I might say that we have in mind offering a motion for summary judgment, but I believe before we can do that it will be necessary for us to take some depositions in this case. We would like to have sufficient time to do that.

THE COURT: What about it, Mr. Buchanan? Have I correctly stated what the problems are that are involved here?

MR. BUCHANAN: Your Honor, I think you have reasonably stated the situation, but before we go to the expense of taking a lot of depositions I would like to call to your Honor's attention the fact that my clients were very seriously injured in this case, and I do not think this court has any jurisdiction at all. There is no diversity of citizenship and the alignment of these parties with Chimes as defendant instead of joining in with the insurer is just a mere subterfuge, and I think we ought to consider that before we spend any money.

THE COURT: In that connecton, Mr. Buchanan, that matter is decided, and if you get anybody to change that it will have to be the Court of Appeals. I am all through with that phase of the case. Now, what about the rest of it?

MR. BUCHANAN: I do not have any objection to the depositions as long as we do not spend too much money or too much time.

MR. CARY: We can do that in two weeks, your Honor, and at that time I will have some sound evidence as a basis for the formal motion that we want to make on behalf of the plaintiff for a summary judgment in this declaratory judgment action.

THE COURT: Very well, we will keep it on the pre-trial docket and put it over two weeks.

JUDGE LEDERLE: Now the two weeks has transpired and the case is called again.

THE COURT: Mr. Cary, what about your deposition? Have you taken it?

MR. CARY: Your Honor, in this case we now have a deposition that I think fully illustrates and proves that the defendant driver, Austin, at the time this accident occurred had departed from the scope of his employment with Chimes, Incorporated, had gone into a territory that he was not allowed in, after his regular hours, that he did not have any right to have the truck, and in fact he had instructions to bring it in to the garage at night, and, as I understand, had picked up a colored boy and visited about seven bars before the accident occurred. I think we have ample in this case now to warrant the motion that we have filed with you for a summary judgment of no cause of action in this case.

THE COURT: Mr. Buchanan, do you have any depositions or any affidavits that you want to file?

MR. BUCHANAN: I did not file any affidavits, your Honor, and I did not take any depositions. I rely entirely on the depositions taken by Mr. Cary. They clearly show that the driver of Chimes was drunk. He had been in some seven or eight bars, all within the territory to which he was assigned, and, anyhow, this case does not belong in this court at all. I have eight actions pending in the state court and I am going to let the jury over there, if your Honor permits me, determine whether this man was within the scope of his employment, and I do not want this action to be *res judicata* in my cases over there. And, anyhow, the moton should be denied and I think your Honor will do so.

THE COURT: As I see it, I will have to find the facts based on this deposition and, frankly, I have not read the deposition yet. I would want to consider it very carefully, anyway, and I will keep the case on the pre-trial docket and at this time I will give myself a couple of weeks to work on it and if I grant the motion for a summary judgment of course that will take care of it. If I don't, be prepared to go ahead at the next pre-trial hearing on the other matters that may come up. This matter will stand adjourned for two weeks.

The case of Peter Ninni against Pennsylvania Greyhound Lines, Inc.

Mr. Cary, is the plaintiff ready?

MR. CARY: The plaintiff is ready for trial, your Honor.

THE COURT: Mr. Buchanan?

MR. BUCHANAN: If the Court please, I am not ready for trial. This case involves an accident involving an injury to a passenger on an interstate bus, and it is going to be necessary for me to take a deposition and go all around the country for the various witnesses, but before I do that, and possibly to limit our work, I would like to take the plaintiff's deposition, and if your Honor would instruct Mr. Cary when to have his client come to Detroit I would like to take his deposition. He is down in Tucson, Arizona now.

MR. CARY: If he wants the plaintiff's deposition he will have to go to Tucson, Arizona. We have no way of getting him here for a deposition at this time.

THE COURT: Mr. Buchanan, if you know of any way that I can make this plaintiff come to Detroit from Tucson I wish you would tell me. I don't know. I can set the case down for trial and he will probably have to be here. Do you want that?

MR. BUCHANAN: Rather than set it for trial before we do a little work, I think I had better arrange to have counsel in Tucson take his deposition.

THE COURT: Let me ask you a few questions about that. As I have told you before, I think that a pre-trial hearing should be an occasion where a judge discloses his ignorance rather than to display his wisdom. I am not sure that I understand this problem. As I read the pleadings the claim of the plaintiff is that he was a paid passenger on the bus going through Terre Haute, Indiana and while he was there he walked down through the aisle and fell over some baggage that was negligently placed there by the agent of the defendant, the driver, or that the agent of the defendant should have known it was there and that it was negligence for him to permit that condition to exist.

I think maybe you might be successful in your action if you get the kind of deposition that you think you are going to get, but Aesop said over five hundred years B. C., "A man is wont to see things as he wishes them to be," and I find that sometimes lawyers look at their cases that way, so let me ask you a few questions. Is this case going to be determined on the basis of Indiana law, Mr. Cary?

MR. CARY: Well, I don't think there is any question, your Honor, that the Indiana law is controlling on this court in this action. It happened in Terre Haute, Indiana.

THE COURT: Where was the contract entered into for the carriage of passengers?

MR. CARY: That contract, as I understand, started in Tucson, Arizona.

THE COURT: You are claiming that we will construe that contract on the basis of the Indiana law; is that it?

MR. CARY: I do not think we have to construe a contractual relationship in this case at all. I think it is purely a question of negligence both under the common law and under the statutory provisions of the Interstate Commerce Commission, as we set forth in our complaint.

THE COURT: Maybe that is not the problem, but give it a little thought. At any rate we can discuss it later at the pre-trial hearing. I think Mr. Buchanan is entitled to take this deposition, and I certainly do not want to discourage any lawyer from making a complete preparation in advance of trial of his case. I would rather have you prepare your lawsuits in the office than in the courtroom. How much time do you need on this job, Mr. Buchanan?

MR. BUCHANAN: I do not think we ought to hurry, if the Court please. Plaintiff just started his suit about twenty-four days ago, and I made the mistake of getting my answer in on time. The case has not been at issue for more than five days. I do not think we ought to hurry in respect to the trial. I would say thirty days. I have to be sure I do not hire the same lawyer he does down in Tucson. If we might have thirty days I think we could do it.

THE COURT: When did you first discover that your cases came up promptly in this court?

MR. BUCHANAN: I am familiar with your Honor's docket, but I might say that the plaintiff waited until about four months before the statute of limitations expired to start his suit, so I do not think we ought to hurry about it.

THE COURT: I think you are right about that and, as I said, you can take this deposition. Supposing we put it over a month and come back then.

JUDGE LEDERLE: The month has transpired and the attorneys have worked fast and are back here now.

THE COURT: All right, Mr. Buchanan, how did you make out on this Ninni case?

MR. BUCHANAN: I was really more optimistic than the Court was when I started out, but your Honor I think has had an opportunity to review the deposition. It clearly shows that the plaintiff had been sitting in the front seat of the bus, that the driver was absent from the bus taking care of necessary business, and that the plaintiff walked to the rear of the bus. The aisle was clear and he walked to the rear of the bus, turned around, and walked to the front of the bus and on the way to the front he stepped over some baggage and fell. The witness for the plaintiff—he is the plaintiff himself—says there are no other witnesses to this occurrence and there being no other witnesses I think we have a right to rely on his testimony. He says very clearly that there was nothing in the aisle a couple of seconds before the accident and then the accident happened, so I feel that there is no negligence shown whatever on the plaintiff's whole case. There was neither negligence in putting the baggage there nor sufficient notice that it was there, if in fact it were, to constitute constructive notice. I think we are entitled to our summary judgment in this case.

THE COURT: All right, Mr. Cary.

MR. CARY: Well, we do not have any further proof that we can take or secure, your Honor, but we still feel that under paragraph (e) of the complaint there is a clear violation of the Motor Vehicle Act. The Interstate Commerce Commission rules say that the aisle of a bus must not be obstructed. A clear question of fact is raised in this case for submission to the jury, and we ask that this case be held over for a jury trial of the issues involved.

THE COURT: Didn't I hear you say something at the last hearing that this was a clear case of Indiana law? Where did you get this Interstate Commerce Commission law?

MR. CARY: I think we will have to stand on that.

THE COURT: I think that this is a matter really that should be taken care of on your motion for a summary judgment if we can. It will save time and expense for the litigants and time and expense for the Court and the Government. I will take the matter under advisement and report promptly to you and in the meantime will keep the matter on the pre-trail docket.

By the way, this will bring us to about the month of August and I am going to take a little vacation myself, so you may not hear from me again until sometime after September, and I will send you a new order for another pre-trial hearing unless I decide the matter on the motion for a summary judgment.

JUDGE LEDERLE: Now, if in your imagination you can get over to Mr. Buchanan's office for a minute, he will put on a demonstration of what happened in his office. He will take the part of several actors when he received my opinion in this case.

MR. BUCHANAN: It is not September or August; it is two days after the pre-trial hearing and I have before me the Judge's opinion and I am not at all interested in the first four pages. I want to look at the back. And it says that the motion for summary judgment is granted. One of my partners is over here and he says,

"You mean the Judge says we don't have to try that case?"

"That's correct."

"All right, Butch, let's get the bill in to Pennsylvania Greyhound fast before Congress raises the income tax law so that we will have a little bit left out of that fee." (Applause)

JUDGE LEDERLE: This third case we have put together to illustrate a little bit different type that attorneys are usually interested in, and that is in bringing up the possibilities of settlement which some people talking about pre-trial seem to emphasize very much. The title of the case is Jones against the General Motors Corporation and Smith. You will not find it in the mimeographed material that has been distributed. It is a brand new case, just originated this morning. Plaintiff Jones is the administratrix of her deceased husband's estate. Hereafter we will refer to her merely as plaintiff.

THE COURT: Gentlemen, as I understand this case it is very simple. Two truck drivers started across the intersection of Livernois Avenue at the 7-Mile Road and both of them went into the intersection on a green light, as quite often happens. They came together and as a result of the collision the plaintiff's decedent was killed. As I understand, he lived for about ten days. The problem of payment for suffering may be involved, but it was agreed on behalf of the defendant that the injuries he sustained were the sole cause of his death. There is no property damage in-

volved. He did not happen to own the vehicle. As I see it, knowing you two fellows, I guess this is a case that will have to go to the jury to let them decide which lights were red and which lights were green.

By the way, Mr. Cary, this is a rather important intersection, both streets about equally important, are they not?

MR. CARY: That is right, your Honor.

THE COURT: And there are about six traffic control lights, as I recall it, up there, one on each corner and two overhead?

MR. CARY: There is no question about that and they were operating.

THE COURT: All right. Is my usual stock charge all right for both of you?

MR. CARY: It's all right with me.

MR. BUCHANAN: All right with me.

THE COURT: I have not had a death act case for some time. What do you claim you are entitled to under the Michigan Death Act, Mr. Buchanan?

MR. BUCHANAN: If the Court please, the widow had three children at the time of the accident and a fourth one was born after the accident. The decedent lived ten days and of course suffered twenty-four hours a day for ten days, conscious pain and suffering. We are also entitled to pecuniary loss consisting of the contribution the husband would have made to the wife during her expectancy until the children become of age. He earned $4600 a year and the family would have taken at least $4500 of that, so we are entitled to the present worth of $4500 for thirty-four years, reasonable compensation for conscious pain and suffering, and the funeral bills.

THE COURT: Do you think it would be satisfactory if I just read the Michigan Death Act in my charge, or do you want a special charge on that, either one of you?

MR. BUCHANAN: I think you ought to explain what pecuniary loss is to the jury, as I have outlined it.

MR. CARY: I think it is satisfactorily set up in the Act.

THE COURT: Let us leave it this way. If either one of you want a special charge on that phase of the case you can submit it at the opening of the trial. I wish you would get it to me, promptly. I anticipate that this is going to be a very short trial and I do not want to wait until you get ready to start your argument before I start looking at it. Will you both agree to do that if you want a special charge?

MR. CARY: Yes, we will, your Honor.

MR. BUCHANAN: Yes, your Honor.

THE COURT: When can you be ready for trial, Mr. Buchanan?

MR. BUCHANAN: If the Court please, my client would like to have that General Motors money as soon as possible, and I am ready now.

MR. CARY: We can be ready any time.

THE COURT: All right, I will see what I can do for you. How about next Tuesday?

MR. BUCHANAN: Just a minute.

MR. CARY: I do have a convention and a couple of other things. It might be advisable if we could discuss this case a little bit in chambers. We do not feel that there is any liability, of course, in this action, but there are things about it and on a reasonable basis we might discuss some adustment.

MR. BUCHANAN: If the Court please, I am perfectly willing. I have not had anything offered yet, but I am willing to listen.

THE COURT: Wait until I finish my calendar and then I will see you in chambers.

JUDGE LEDERLE: The operation then will be that they will have to step aside until I finish the rest of the court work and then they will go around to my chambers and cool their heels in the reception room until I invite them in. I will not keep them very long there today.

"You may show Mr. Cary and Mr. Buchanan in."

Now they are in and we become a little bit informal.

MR. BUCHANAN: Do we have to leave on our coats?

THE COURT: You can take your coats off.

MR. CARY: How about something to smoke?

THE COURT: That's all right if you follow my rule—furnish your own cigarettes.

By the way, have you heard the story of the fireman with the beautiful wife?

MR. CARY: Don't believe I have.

THE COURT: I guess maybe we better not spend any time on that now. I'll tell you later.

You know, Mr. Buchanan, what the attitude of the Michigan Supreme Court is as to intersection collisions, don't you?

MR. BUCHANAN: I realize that, your Honor, but I have read a lot of the late Michigan Authorities and I can assure you that my clients will testify right within the right lines.

MR. CARY: That sounds about like what the basis of this case is. Of course it may be of no interest to Mr. Buchanan to know that General Motors Corporation has a $5,000 limit in its policy.

MR. BUCHANAN: Now, I might state to your Honor, and Mr. Cary too, that with the defendant General Motors Corporation I am not too much concerned—in fact not even remotely interested—in respect to their coverage, but I have another problem. My client, of course, you know, is really upset because of the death of her husband and, although she hired me to prosecute her case, I am just a nominal adviser. She has a brother—he is a barber—and he knows all about these cases and he has been reading in the papers about the present trend of verdicts. He knows what the last quarter earnings of General Motors were, so I have the problem of satisfying the barber and the client.

THE COURT: I think, Mr. Buchanan, you should consider very carefully any offer that is made here. I think it ought to be presented very carefully to your client. It is a serious matter.

Do I understand you to mean that you would really pay the $5,000, Mr. Cary?

MR. CARY: No, I don't put it that way, Judge. It may sound peculiar to think they carry a policy with that low a limit, but they do it in order to get the administrative work and investigative work done, and in cases as lousy as this case I wouldn't think of going to General Motors and letting them know we are going to settle it, but for something under $5,000, say, we might be interested in just saving the nuisance of a piece of litigation of this type.

THE COURT: Well, after all, this is kind of a distressing experience, don't you think? It's worth something to the good will of General Motors and in turn to their insurer to be a little bit, oh, possibly you might put it generous, if you want to, in a case of this kind.

MR. CARY: That seems to be the new viewpoint towards insurance clients.

MR. BUCHANAN: It is difficult to understand the word "generosity" in terms of something less than $5,000.

THE COURT: That may be. I wish you gentlemen would talk it over and I wish, Mr. Buchanan, that you would explain very carefully to your client, the widow, that I may have to direct a verdict against her after the proof is in and that she should consider very carefully the difference between taking something and taking nothing. I am assuming that what Mr. Cary is going to offer is something and I am not assuming that he made his best offer. I've had him around my courtroom too much to know that, so suppose you do this: You talk this matter over and see how well you can do, Mr. Cary, and then I think it will be helpful to all of us, Mr. Buchanan, if you would have the widow and her barber brother at the next session. Bring them in so that we can talk it all over. I may not learn any law from this barber, but I may learn how to run that electric razor of mine.

MR. BUCHANAN: I think it is an excellent suggestion because if I am going to have to tell this widow and four kids that her husband is worth less than $5,000 and on top of that that you might direct a verdict against her, I would like to have you tell the widow that yourself and I would appreciate it if you would tell the barber too.

THE COURT: I can understand your feelings. I am not entirely unselfish about this matter. I don't especially relish the idea of looking these kids in the face and this widow and telling them that under the law they can't recover anything, so that possibly this is the kind of case that we should discuss thoroughly in chambers and see if we can't get it settled.

That's all. Thank you, gentlemen. Now go back to work. (Applause)

MODERATOR KNEPPER: It would seem to me that we all have to agree it would be a distinct pleasure to try cases in Detroit, Michigan before Chief Judge Lederle. I now want to present him to you for a talk on the subject, "The Value of Pre-Trial to the Trial Judge." All right, sir. (Applause)

HONORABLE ARTHUR F. LEDERLE: I must apologize to you for reading this material, but, frankly, I dictated it Tuesday while following the doctor's orders in bed, and I have not had very much time to operate on it since. I do not know whether any of you have ever had to suffer for a doctor's sins or not. I found that it was bad enough to suffer for my own sins, but now with this aureomycin and the other 'cins the doctors have in me I am not sure that I could think straight enough if I did not have this written material before me.

volved. He did not happen to own the vehicle. As I see it, knowing you two fellows, I guess this is a case that will have to go to the jury to let them decide which lights were red and which lights were green.

By the way, Mr. Cary, this is a rather important intersection, both streets about equally important, are they not?

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MR. BUCHANAN: All right with me.

THE COURT: I have not had a death act case for some time. What do you claim you are entitled to under the Michigan Death Act, Mr. Buchanan?

MR. BUCHANAN: If the Court please, the widow had three children at the time of the accident and a fourth one was born after the accident. The decedent lived ten days and of course suffered twenty-four hours a day for ten days, conscious pain and suffering. We are also entitled to pecuniary loss consisting of the contribution the husband would have made to the wife during her expectancy until the children become of age. He earned $4600 a year and the family would have taken at least $4500 of that, so we are entitled to the present worth of $4500 for thirty-four years, reasonable compensation for conscious pain and suffering, and the funeral bills.

THE COURT: Do you think it would be satisfactory if I just read the Michigan Death Act in my charge, or do you want a special charge on that, either one of you?

MR. BUCHANAN: I think you ought to explain what pecuniary loss is to the jury, as I have outlined it.

MR. CARY: I think it is satisfactorily set up in the Act.

THE COURT: Let us leave it this way. If either one of you want a special charge on that phase of the case you can submit it at the opening of the trial. I wish you would get it to me, promptly. I anticipate that this is going to be a very short trial and I do not want to wait until you get ready to start your argument before I start looking at it. Will you both agree to do that if you want a special charge?

MR. CARY: Yes, we will, your Honor.

MR. BUCHANAN: Yes, your Honor.

THE COURT: When can you be ready for trial, Mr. Buchanan?

MR. BUCHANAN: If the Court please, my client would like to have that General Motors money as soon as possible, and I am ready now.

MR. CARY: We can be ready any time.

THE COURT: All right, I will see what I can do for you. How about next Tuesday?

MR. BUCHANAN: Just a minute.

MR. CARY: I do have a convention and a couple of other things. It might be advisable if we could discuss this case a little bit in chambers. We do not feel that there is any liability, of course, in this action, but there are things about it and on a reasonable basis we might discuss some adustment.

MR. BUCHANAN: If the Court please, I am perfectly willing. I have not had anything offered yet, but I am willing to listen.

THE COURT: Wait until I finish my calendar and then I will see you in chambers.

JUDGE LEDERLE: The operation then will be that they will have to step aside until I finish the rest of the court work and then they will go around to my chambers and cool their heels in the reception room until I invite them in. I will not keep them very long there today.

"You may show Mr. Cary and Mr. Buchanan in."

Now they are in and we become a little bit informal.

MR. BUCHANAN: Do we have to leave on our coats?

THE COURT: You can take your coats off.

MR. CARY: How about something to smoke?

THE COURT: That's all right if you follow my rule—furnish your own cigarettes.

By the way, have you heard the story of the fireman with the beautiful wife?

MR. CARY: Don't believe I have.

THE COURT: I guess maybe we better not spend any time on that now. I'll tell you later.

You know, Mr. Buchanan, what the attitude of the Michigan Supreme Court is as to intersection collisions, don't you?

MR. BUCHANAN: I realize that, your Honor, but I have read a lot of the late Michigan Authorities and I can assure you that my clients will testify right within the right lines.

MR. CARY: That sounds about like what the basis of this case is. Of course it may be of no interest to Mr. Buchanan to know that General Motors Corporation has a $5,000 limit in its policy.

MR. BUCHANAN: Now, I might state to your Honor, and Mr. Cary too, that with the defendant General Motors Corporation I am not too much concerned—in fact not even remotely interested—in respect to their coverage, but I have another problem. My client, of course, you know, is really upset because of the death of her husband and, although she hired me to prosecute her case, I am just a nominal adviser. She has a brother—he is a barber—and he knows all about these cases and he has been reading in the papers about the present trend of verdicts. He knows what the last quarter earnings of General Motors were, so I have the problem of satisfying the barber and the client.

THE COURT: I think, Mr. Buchanan, you should consider very carefully any offer that is made here. I think it ought to be presented very carefully to your client. It is a serious matter.

Do I understand you to mean that you would really pay the $5,000, Mr. Cary?

MR. CARY: No, I don't put it that way, Judge. It may sound peculiar to think they carry a policy with that low a limit, but they do it in order to get the administrative work and investigative work done, and in cases as lousy as this case I wouldn't think of going to General Motors and letting them know we are going to settle it, but for something under $5,000, say, we might be interested in just saving the nuisance of a piece of litigation of this type.

THE COURT: Well, after all, this is kind of a distressing experience, don't you think? It's worth something to the good will of General Motors and in turn to their insurer to be a little bit, oh, possibly you might put it generous, if you want to, in a case of this kind.

MR. CARY: That seems to be the new viewpoint towards insurance clients.

MR. BUCHANAN: It is difficult to understand the word "generosity" in terms of something less than $5,000.

THE COURT: That may be. I wish you gentlemen would talk it over and I wish, Mr. Buchanan, that you would explain very carefully to your client, the widow, that I may have to direct a verdict against her after the proof is in and that she should consider very carefully the difference between taking something and taking nothing. I am assuming that what Mr. Cary is going to offer is something and I am not assuming that he made his best offer. I've had him around my courtroom too much to know that, so suppose you do this: You talk this matter over and see how well you can do, Mr. Cary, and then I think it will be helpful to all of us, Mr. Buchanan, if you would have the widow and her barber brother at the next session. Bring them in so that we can talk it all over. I may not learn any law from this barber, but I may learn how to run that electric razor of mine.

MR. BUCHANAN: I think it is an excellent suggestion because if I am going to have to tell this widow and four kids that her husband is worth less than $5,000 and on top of that that you might direct a verdict against her, I would like to have you tell the widow that yourself and I would appreciate it if you would tell the barber too.

THE COURT: I can understand your feelings. I am not entirely unselfish about this matter. I don't especially relish the idea of looking these kids in the face and this widow and telling them that under the law they can't recover anything, so that possibly this is the kind of case that we should discuss thoroughly in chambers and see if we can't get it settled.

That's all. Thank you, gentlemen. Now go back to work. (Applause)

MODERATOR KNEPPER: It would seem to me that we all have to agree it would be a distinct pleasure to try cases in Detroit, Michigan before Chief Judge Lederle. I now want to present him to you for a talk on the subject, "The Value of Pre-Trial to the Trial Judge." All right, sir. (Applause)

HONORABLE ARTHUR F. LEDERLE: I must apologize to you for reading this material, but, frankly, I dictated it Tuesday while following the doctor's orders in bed, and I have not had very much time to operate on it since. I do not know whether any of you have ever had to suffer for a doctor's sins or not. I found that it was bad enough to suffer for my own sins, but now with this aureomycin and the other 'cins the doctors have in me I am not sure that I could think straight enough if I did not have this written material before me.

The Value of Pre-Trial To The Trial Judge

HONORABLE ARTHUR F. LEDERLE
United States District Judge
Detroit, Michigan

I CONSIDER it a high honor to have an opportunity to appear on the program of this distinguished organization. It has been a pleasure to work with Mr. Knepper, as chairman, for he has efficiently outlined the program in every detail. In fact, I think he stated the subject for my remarks more accurately perhaps than he thought he did. You will note that it reads, "The value of pre-trial to the Trial Judge," and not "To a Trial Judge."

This is important because, as pointed out by Will Shafroth, (Chief of the Division of Procedural Studies and Statistics of the United States Courts),

"Pre-trial doesn't mean the same thing in different jurisdictions."

I am sure we can all agree that Mr. Shafroth has the ability and training to qualify him as an expert. In the position he has so efficiently filled for the past twelve years, he has had an opportunity to observe the procedure in courts of all kinds, both Federal and State.

I think it was Mr. Justice Hughes who said that the Constitution means what the Supreme Court says it means. Similarly, I believe a pre-trial means what the judge presiding makes it mean.

After fifteen years of experience, I have concluded that any pre-trial is only a part of our modern, more efficient court procedure. In many cases, the distinction between pre-trial and trial is highly artificial.

Much has been said about the time that is saved by use of pre-trial procedure. I think time can be saved if,

1. The attorneys make full use of the modern discovery techniques and prepare the pleadings in accordance with the spirit of the rules.

2. The judge carefully studies the pleadings, interrogatories, depositions and exhibits prior to the pre-trial hearing.

This means that the judge who is going to try the case should conduct the pre-trial hearings. In many cases, if one judge handles the preliminary motions, another judge handles the pre-trial hearing, and a third judge conducts the trial, very often time and effort will be wasted.

In an address before the 1950 United States Judicial Conference, Attorney General McGrath stated:

> "I should like to indicate the continuing interest of the Department of Justice in respect to a recommendation which was submitted to this conference by Attorney General Clark in his report two years ago. This concerns the designation in each anti-trust case of a single judge to hear all motions and other matters preliminary to trial, to conduct all pre-trial procedure, and to preside at the trial of the case itself. When an anti-trust case is pending in a court which is composed of many judges and has a large volume of business, the various motions necessary from time to time, normally come up for hearing before whatever judge happens to be assigned to the motions calendar at the time the motion is made. This has inevitably meant that each judge so involved must familiarize himself with comprehensive and highly involved pleadings and issues, as well as with the prior proceedings in the case. This is obviously time-consuming and needlessly burdensome. The procedure I am supporting here has been followed recently in several cases. I submit that consistent use of this procedure would be desirable."

An example of the disadvantage of having separate judges conduct trial and pre-trial appears in my opinion in *Owen v. Schwartz*, 177 F. 2d 641, 14 A. L. R. 2d 1337, written while I was sitting with the Court of Appeals for the District of Columbia. There a judgment for defendant had been based in part upon the trial court's holding that there was a fatal variance between plaintiff's pleadings and proofs. The trial judge had not felt bound by a formal pre-trial order entered by another judge, which formulated the issues in accordance

with plaintiff's ultimate proof. One of the reasons for reversal was that the pre-trial order in effect amended the pleadings and that the parties and the trial judge were bound thereby.

I am in full accord with this statement made by Chief Judge Vanderbilt:

"The great objective of the pre-trial conference, however, is precisely that which leads our appellate judges to read the briefs in advance of the argument—to enable the judge to have an intelligent view of the entire case before beginning to exercise the judicial function of hearing the case or listening to the argument of an appeal."

Judge Learned Hand has said;

"I must say that as a litigant I should dread a law suit beyond almost anything short of sickness and death."

I am sure that the learned judge's feelings are shared by most business men these days. That is the reason why more and more controversies that should normally be handled by the courts are being transferred to various boards, commissions and other tribunals where the parties hope to avoid the technicalities that we orthodox lawyers have worshipped too fervently.

In the words of the late President Franklin D. Roosevelt, the public does not believe that in these times we can afford the luxury of litigation.

At one time I thought that this was a serious problem for the attorneys, but it seems that the attorneys have been able to adjust themselves by becoming "five percenters," or operating as public relations counsel, or merely agents. They apparently have not only been able to make a good living for themselves, but on occasion have been able to distribute mink coats.

The judges should be more interested in modernizing the court procedure than the members of the bar, for this is necessary to maintain the prestige of the courts.

It is always important to remember that the judicial process involves three operations:

First, Find the facts.
Second, Find the law.
Third, enter the judgment the law compels.

Procedure that facilitates any of these operations is worth while. It seems obvious that a pre-trial hearing, efficiently conducted, does often save time and expense in arriving at the ultimate objective of all legal proceedings, that is, a just judgment.

Interpolation No. 1. I may interpolate here. As I see it, there is no difference between Mr. McGarth's so-called complicated anti-trust cases and any other case you have in court except a question of degree, and if Attorney General McGrath is entitled to this consideration every other attorney in the country is entitled to the same consideration at the hands of the Federal Judiciary.

Interpolation No. 2. As Arthur Godfrey says, "I thought I would get a response," when I emphasized the fact that Chief Judge Vanderbilt particularly pointed out that he was only talking about his appellate court reading the briefs, and so forth, before hearing.

Interpolation No. 3. Thank you very much, gentlemen. (Applause)

MODERATOR KNEPPER: Thank you, Chief Judge Lederle, and we are deeply indebted to you for the time and the trouble that you have taken in preparing the material today.

I know that the Judge wants to make the acquaintance of all of us here and I know that you will enjoy meeting him. To put it in the vernacular, he is a swell guy. And to Mr. Cary and Mr. Buchanan, our thanks to them.

Now we pass to another portion of our program dealing with practical experiences in pre-trial. I told you this was an Ohio-Michigan program. Our next speaker demurred a little, incidentally, when we asked him to be on the program because he said he had to make a speech this morning and he did not think he should make one in the morning and another in the afternoon, but we told him he had to do it anyway. He comes from West Virginia, but in checking his biography I found that he graduated from Marietta College, and Marietta College is in the state of Ohio and it thought enough of him to graduate him *magna cum laude*. Stanley Morris is going to tell us some of his experiences with pre-trial. Stanley. (Applause)

Some Practical Experiences With Pre-Trial Procedure

STANLEY C. MORRIS
Charleston, W. Va.

I SHARED, as did all of you, I am sure, Bill Knepper's enjoyment of this demonstration that we had this afternoon. And I heartily agree that there must be never a dull moment appearing in Judge Lederle's court in Detroit. He reminded you that he had a story which he might tell you with sufficient urging. You know, I understand that pre-trial grew out of the congestion of dockets in the larger centers. I might say that we here in West Virginia do not have as much experience with pre-trial as many of you do in states where it is used in the state courts. We are still pretty much a common law pleading state in West Virginia, and there is no formal provision for pre-trial conference and it is very little used by our state trial judges. On the other hand, it is of course used extensively by our three federal judges. I was interested in how rapidly the attorneys here came to the issue. No time was lost and it was obvious that they had made a very thorough advance preparation of their respective duties in the matter.

One of our federal judges here has a rule which he religiously enforces, which seems to me to be a good one. It is sometimes burdensome, but he requires that the lawyers in advance of the pre-trial prepare a careful trial brief, both outlining the facts which they expect to prove and the law upon which they expect to rely.

Require the presentation of those briefs to him, but not their exchange with opposing counsel. I hear a good many lawyers complain of it, but my personal feeling is that it is a good thing for us to do. The other two federal judges, I believe, do not require it, but welcome the same procedure.

This same federal judge who requires the briefs also suggests very strongly to lawyers that they come to this pre-trial conference with written stipulations as to formal matters; that they do at least that ahead of time so that they can agree on the presentation of formal exhibits without proof and verification, of course reserving for themselves the right to object to their admissibility or their legal significance.

My own feeling has been, and in practice I have attempted to make a rather careful preparation for various pre-trials, to think through pretty thoroughly what the other fellow may say and what my answers may be. Frankly, the schooling that we here in West Virginia have had has been that, following the old type of practice, we do not tell the other fellow too much and try to surprise him. That is the standard technique, you know, of the old-time trial lawyer, and we of course try to proceed in the spirit of the rules about federal pre-trial, but there is obviously a certain strategy in the way you approach the pre-trial and what you bring up and just how you handle it.

The time for pre-trial is something we think is important. We of course do not control what our courts do, but down here our courts conduct these pre-trials at least a week or ten days before the time set for the actual trial. I am told that in some jurisdictions that is not the case, and to me it is a rather important feature of good, sound pre-trial practice to have your pre-trials at least some time ahead of the trial so that you can take the material that you get there and digest it.

I was interested in the fact that Judge Lederle conducts his in open court. Our judges generally conduct theirs in their chambers. I do not think that is an important matter at all. Where it is conducted does not seem to be too important. Generally I notice that while we are sitting around in the courtroom waiting for these pre-trials there are no laymen or spectators or clients there. Generally the clients are not invited to these pre-trails in our jurisdiction.

We had a case once in which it was our privilege to appear in behalf of a rather noted trial lawyer from another state. He was the client, so we went into this pre-trial conference with this client of ours, who was well known to the judge and who was wel-

comed into the conference and he of course was thoroughly capable of handling himself and he pretty much carried the ball in that conference; so if you are fortunate enough to have some good trial lawyer as your client, do not forget to take him to the pre-trial conference with you if the judge will let you do so.

Our judges usually have a court reporter present, not to take down everything that is said at all, but when and if determinations are reached a record is made of them and at the conclusion the judges usually dictate a rough draft at least of a pre-trial order right there when it is fresh in everybody's mind to take exception or to concur in what is being done.

Larry Varnum, who is going to follow me, is going to discuss pretty much, I understand, his ideas of what the proper functions of the judge should be in these pre-trial conferences, at least the question of how far he should go toward promoting settlements. I do not want to trespass on that, but I want to discuss two rather interesting experiences that we have had in such matters as that. In one of the cases involving rather serious personal injuries—not handled by myself, but by another member of our firm—there were serious personal injuries which had a disfiguring effect upon a child and there was some doubt about liability, but the defendant, whom we represented, was willing to make a substantial payment. There was wide disagreement between the parties as to what would be a proper compromise, and both parties suggested to the court that they would like to have a figure after hearing the discussion in the pre-trial, not necessarily a decision, but the court's idea. The court declined to give such an opinion, but suggested he might do so if some medical advice or report was presented informally. So representing the defendant we agreed to employ some surgeon or any surgeon at the judge's suggestion. We would finance that thing and it was agreed to by counsel for the plaintiff and that was done . This surgeon examined the child, made the report, and after hearing that report the court suggested a figure which was agreeable to both parties, and the matter was disposed of.

The other case was a rather interesting one in which the pre-trial developed with some advantage to us representing the defendant. In that case a colored driver of an automobile admittedly entered a bridge by the exit lane. He came in on the wrong lane and he had a head-on collision with a truck which was admittedly proceeding in the proper lane, and in the plaintiff's complaint they charged the truck driver with being negligent in that his speed was excessive.

When we got around to the issue of contributory negligence, on which we had a considerable amount of evidence which at the pre-trial conference we disclosed to the court, they said, "We rely on the last clear chance doctrine."

We said, "If you say that the truck driver was coming so fast, how can you say that he had time after the discovery of the peril of your driver to have been guilty of a violation of his duties under the last clear chance doctrine? If you say this man was going so fast, how can you say he had time to avoid the accident under the last clear chance doctrine?" That sufficiently impressed the plaintiff's lawyers that they reduced their demand and we were able to settle that case. (Applause)

MODERATOR KNEPPER: We are moving along here as rapidly as we can, and to wind up the speaking portion of this, following which we hope to have a few minutes for questions, I want to give you the able and hard-working Vice-Chairman of the Practice and Procedure Committee, Larry Varnum, of Grand Rapids. Okay, Larry. (Applause)

The Judge's Role in Settlements

LAURENT K. VARNUM
Grand Rapids, Michigan

I HAVE been asked to talk to you about 10 minutes on the subject of The Judge's Role in Settlements. Personally, I am a firm believer in settlements. I do not mean that every case can be settled. Human nature being what it is, that is not even possible. It is also true that many cases should not be settled, especially if the plaintiff has no case whatsoever, if it is a nuisance action, or if there is some question of

policy involved, but by and large it is my feeling that in the ordinary case which involves questions of fact, the interests of the parties are best served by an amicable adjustment or compromise and payment of a stipulated sum.

As you all know, being attorneys, attorneys are quite reluctant to open up the question of settlement because each one feels that to first suggest a settlement is an indication of weakness and that is where the judge comes in, to my way of thinking, with respect to this matter of settlement. I think that the judge can be the most important factor in arriving at an equitable and fair compromise. This of course should be handled sufficiently in advance of trial so that the parties can have a little time to work on it if the judge makes the suggestions.

I think these pre-trial conferences, at least in so far as they pertain to settlements, should be had in chambers and not in open court. I strongly believe that the clients should never be present when settlement is being discussed.

Now, what should the judge do? To my way of thinking, in the first place, he should make a thorough inquiry into the question of whether or not good-faith efforts have been made by both parties to reach an amicable compromise of their differences. He should, by thorough questioning, determine whether or not they have actually entered into the spirit of compromise in good faith and not to secure some advantage. Of course the judge should be familiar with the case before entering into this pre-trial conference, and that is where the trial brief comes in, which I am a firm believer in also. I think that every judge should be furnished with a trial brief well in advance of the trial and well in advance of any pre-trial conference, so that he is familiar with the facts and issues in the case and is able from his experience to determine in his own mind whether this is a case for compromise or whether it is a case that is going to have to be tried.

The judge should, to my mind, encourage, but not force, a settlement. I have seen in my several years of experience various extremes in the role that the judge takes in settlement. We have one judge who habitually writes a letter when a case is ready for trial in which he says, "This case will be heard before the jury at 10:00 a. m. on May 29. Pre-trial conference will be held at 9:30."

At the pre-trial conference you come in at 9:30 and the judge says, "Now, I suppose you fellows have tried to settle this case."

And both sides say, "Oh, yes," and that is the end of it.

That is one extreme. I had an experience at the other extreme which, to my mind, was not a case for settlement. It was a serious case, a case in which I felt the plaintiff had no cause of action whatsoever, but my client could not afford to lose the case. He was worried about it. Neither could the plaintiff afford to lose the case, but nevertheless I felt that it was not a case for settlement because there was absolutely no liability. We started in with the trial of the case and at every recess, morning, afternoon, and luncheon, before court convened in the morning and after we adjourned at night, the judge called us into his chambers. For two days he worked on us collectively and separately to try to get us to settle that case. We could not get together. Finally he called the plaintiff and his wife into the court's chambers in the absence of counsel and talked to them alone and after about a half-hour—the plaintiff's attorney and I were sitting in the courtroom—the judge came out and said, "Well, I have settled your case for you." And the plaintiff came out and his face looked like a storm cloud and he was red clear up to his ears, and his wife was in tears. I say that that judge did not do a good job because that case should not have been settled, at least in that manner.

I have a feeling that a judge that works that hard on a settlement is more interested in his record than he is in the justice and the rights of the parties.

I like to think of Judge Raymond, our federal judge in Grand Rapids who died a few years ago, who to my mind was one of the finest gentlemen and one of the ablest judges that I was ever privileged to practice before. Judge Raymond often said to me, "I am more interested in being right than in being affirmed." And I think that any judge that approaches his job from that standpoint is going to have a good record, if he is right rather than being affirmed. Judge Raymond held pre-trial conferences regularly and I settled a good many cases that otherwise would have been tried had Judge Raymond not used his good offices in promoting a settlement. But Judge Raymond did not say, "I suppose you fellows have tried to settle this case." His first question to us was, "What have you done

in regard to settlement?" He would say, "What have you done? How much have you offered?" or "Have you made any offer? How much will you take? Have you offered to take anything?"

He explored thoroughly and carefully not only our feelings in the matter but also whether or not we had actually made a good-faith attempt to settle that case.

In closing I should like to summarize what I like to think of as the judge's role in settlement. The judge should first know the case thoroughly. Secondly, he should conduct a thorough inquiry to determine whether or not good-faith efforts have been made to settle. Thirdly, and finally, he should act as a mediator in an effort to encourage, but not force, a settlement, if in his opinion the rights of the parties will be promoted thereby. (Applause)

MODERATOR KNEPPER: Thank you very much. You have given some very worth-while suggestions.

We have a few minutes, not many, but we are not nearly as far behind schedule as we were when we started. We would like to have the opportunity for a little discussion and some questions. I have only two requests. When you ask your question please state your name for the reporter and, secondly, indicate to which one of the members of this panel your question is addressed. Do we have some questions?

MR. NEAL W. BAIRD (Atlanta, Georgia): I would like to ask Judge Lederle whether he has a set time for assigning pre-trial, that is, a week after the issues are joined, or two weeks, or anything like that.

JUDGE LEDERLE: The pre-trial order, copy of which is in that folder you have—goes out as soon as the case is at issue. It is handled automatically. The date the case is at issue the pre-trial order goes out.

MODERATOR KNEPPER: And how long after that is the pre-trial held?

JUDGE LEDERLE: Normally about ten days. You usually get about ten days notice.

MR. AUBREY F. FOLTS (Chattanooga, Tennessee): I have been impressed of course with the very fine things that have been said, but I do not think we have given enough emphasis to the simplification of the issues in the pre-trial practice. I am sure that is done quite a good deal. We have emphasized settlements and also summary judgments, but one of the greatest values of the pre-trial conferences is the simplification of the issues.

MODERATOR KNEPPER: Judge Lederle, do you have something to suggest on that?

JUDGE LEDERLE: The time to simplify the issue is when you file your pleadings.

MODERATOR KNEPPER: Mr. Horn, of Cleveland.

MR. CLINTON M. HORN (Cleveland, Ohio): I would like to ask Judge Lederle if he has any suggestion to make as to how to bring about the assignment of cases when they are filed to a particular judge where the local federal judges are three in number. How could that be brought about, perhaps by the Bar or by conference, with the judges so that a case would be assigned to some specific judge?

MODERATOR KNEPPER: The question is how to bring about a procedure whereby cases will be assigned to specific judges. Judge Lederle, do you want to mention that?

JUDGE LEDERLE: I am going to have to beg off on that one. I am assigned to the Northern District of Ohio right now. I am one of your judges.

MR. FOLTS: I think Judge Lederle begged off on that first one too just a little bit. Of course, ideally the lawyers are supposed to simplify the issue, but when they do not simplify the issue it takes a very firm hand of the judge to simplify it, and not only the issue, but some of the other various questions. Of course down in Tennessee, as in a lot of other states, we do not have the state practice, and a lot of times we have state judges who come on the federal bench. They are, fortunately, very profound men, but following that general practice, so many times in the South—and Neal Baird will agree with me and also a lot of these other folks—we wind up with a trial when the issues could be very well simplified.

MODERATOR KNEPPER: I think you have a point there.

MR. FOLTS: Just one more thought. I happened to write to every district judge in the United States and many of them replied to me that the pre-trial practice and some of the other phases of discovery simply were not being used by the attorneys. Whether it is the attorneys' fault or the district courts' fault I do not know, but I do know that they are not being used as fully as our learned judge

has indicated that they are in his court. If we were all doing like they are doing in his court it would be wonderful, but I doubt that we are doing that as a whole.

A MEMBER: What can we do, briefly, in order to bring about simplification of the issues?

JUDGE LEDERLE: That is not a problem in Detroit because we have a very patient Bar there and I have no particular difficulty with that. I will say this: that one remedy that courts can apply is to dismiss a complaint that is multifarious and is not as simple as it ought to be. The rules require that the complaint be simple.

If you do not mind a personal observation—and I imagine this will be printed—sitting on the court of appeals in the District of Columbia a short time ago we had an appeal from a lower court, the District Court, dismissing the complaint and the order dismissing it did not state why the judge dismissed it. I think there may have been a hundred reasons, and I think the district judge was quite right; as soon as he found one he did not bother with the rest of them. I went into conference—and I guess I can tell you this—and I suggested to them that we ought to do something for the district judges and sustain that decision on the ground that the complaint itself did not comply with the provisions of the rules in that it was not a simple, concise statement of the plaintiff's claim. I think I have almost quoted the language of the rule.

In answer to your question, I was not exactly trying to be facetious, but I do think it pays to dramatize things once in a while and I thought I was talking to lawyers and I was warning you that if you got into my court you had better not file sixteen pages in a complaint and then expect me to simplify the issues for you. That is really what I meant to say. I did not want to get any of these local lawyers, at any rate, in the habit of filing a book and asking me to dig through it and figure out what the problem is. I think the answer is that probably on the first pre-trial hearing have the judge call the lawyer's attention to Rule 11 and see, first of all, whether he signed the documents and then ask him whether he has really carried out the spirit of Rule 11.

So much for the complaint, that is, in other words, you do not have to even read the complaint. You can count the pages if you want to and arrive at a conclusion that it is not a simple, concise statement. Wth reference to the answer, the same applies. When I pick up an answer and I find out that the defendant does not want to admit that Detroit is in the Eastern District of Michigan, I just look across at him and I say, "Is this your signature here?" And you do not have to do it very often. You would think I was 117 years old with that 30 years I was teaching, but a large part of that is night school in law school. However, as a matter of practice I find that disciplining a courtroom or disciplining a Bar is substantially the same as maintaining discipline in a classroom. I do not know how you do it. You just do it, that's all. I think that probably the Detroit lawyers who are here will all admit that I do not have to tell them in advance. They had better know what their lawsuits are about before they come into court. You ask some embarrassing questions. I was intentionally trying to demonstrate that. I asked a question that these fellows did not know I was going to ask. This whole thing was staged beforehand and we tried to make it go along smoothly, and when I asked my friend Mr. Cary about whether the rule that he was going to apply was the rule where the contract for carriage was made, or Indiana law I caught him flatfooted and then he came back with that proposition about the regulations of the Interstate Commerce Commission, and I am sure that in an ordinary case we would spend a few more minutes on it. We were trying to make up time for you here. We would have straightened that whole thing out. Perhaps I did answer your question too briefly, but I do not want you to think that if you are going to try a lawsuit in my court you are going to come into court and say to me, "Judge, I don't know what this lawsuit is about; I wish you would tell me, and after you get through telling me we will get these issues all simplified and cut them down just where they belong."

MR. TODD DANIEL (Philadelphia): Judge Lederle, do you find from experience that it is better to conduct the pre-trial formally in open court rather than informally in chambers and, if so, why?

JUDGE LEDERLE: I thought we were going to disclose that in our demonstration here. Normally you can finish the kind of work we had in the first two cases very well in court. There are several advantages in that. In the first place, there are a number of young people joining the legal pro-

fession, and that is a good thing, and if they have the opportunity to watch a pre-trial in operation it is helpful in subsequent cases. I think it is worth-while from that point of view, and then the facilities are a little better for talking and moving around, and so forth. On the other hand there are certain phases of the case that should not be conducted in the courtroom, and that was the purpose of putting on this last case. When we got to that question of settlement we stopped talking. In fact Mr. Buchanan disclosed—or was it Mr. Cary?—a little bit more here in the courtroom than they would normally do. Normally all they would say is, "Well, Judge, we would like to talk to you about this matter and maybe we will not have to try it."

And then I immediately say, "Well, I will see you in chambers." That is the general answer to that.

I might add one more thing. I have discovered as a practical matter that, not so much lawyers, but the judge does not waste so much time telling stories if he is out in the courtroom rather than in chambers. (Laughter)

MR. WILLIAM A. HYMAN (New York, New York): I would like to ask Judge Lederle what percentage of the cases brought for pre-trial are settled.

JUDGE LEDERLE: Frankly, I do not know. I do not believe that any body could tell you the effect of pre-trials. I wondered what this data with reference to Cleveland was in this paper for, but I think if I had a chance to ask Miss Riddell it would be that she thought that it might give you an indication of the effect of pre-trials. You see, these cases were all at issue. They were all ready to be set for trial and the percentages that you see at the bottom of the table might mean something. In other words, of the total of 111 cases, 56 were tried. For some statisticians that would be proof that you can settle 50 per cent of the cases at pre-trial hearing. It does not prove that to me.

W. PERCY McDONALD (Memphis, Tennessee): Judge Lederle, what would your ruling be if a prominent specialist, an orthopedic surgeon, was put under subpoena and had to answer and came into your court and they wished to qualify him and to call and ask for his expert opinion without making any provision in advance to pay him for his knowledge? Just as an illustration to put it over, suppose he was a handwriting expert and was brought in to express an opinion; what happens in a case like that?

MODERATOR KNEPPER: May I suggest that that gets a little bit off the subject of pre-trial?

JUDGE LEDERLE: That is all right; it gives me a chance to tell a story.

MODERATOR KNEPPER: All right, it gives the Judge a chance to tell a story and we will let him do it.

JUDGE LEDERLE: Right now I am going to illustrate to you one of the reasons why I think it is sometimes better to hold the pre-trial in the courtroom instead of in chambers, and this is the story: A great many years ago when the girls first started wearing knickers a girl went to a high school in New York with a pair of knickers on and the principal sent her home, and the newspapers thought it was a pretty good story and had the local reporters there. They interviewed the local superintendent of schools and one reporter asked him what he would do under similar circumstances. His answer was this: I would have to see the girl." That applies to your case; I would have to see the case.

MODERATOR KNEPPER: We must terminate this now because we have already taken too much of Mr. Moody's time. We have picked up eight minutes, for which we will take that much credit.

Here you are, Les.

MR. DODD: May I have your attention, please? Before too many of you leave the room we have an announcement or two that I have been asked to make.

In the first place, I want to say that Judge and Mrs. Lederle will be with us here for the next two or three days. They expect to remain with us during the remainder of this convention. They would be delighted to meet all of you people, and I am sure you will find them charming people that you would like to meet.

I have been asked by President Stichter to again call attention to the two memoranda that have been furnished to each registrant here, one to the ladies and one to the men, telling about various arrangements that have been made and particularly the tipping arrangement. It seems that many people are still confused about that. Arrangements have been made under which all tips in the hotel are charged to your account. It is not necessary to tip in the dining room, and in order to avoid any embarrassment if you just put the initials

IAIC on your bills so that the waiters and other people will know that you are part of this convention, that will suffice.

Mr. Pat Carey asked me to announce also that the florist in the hotel has a splendid assortment of purple or white orchids available for those of you that wish to have them for your ladies for the reception this evening, but if you want them order them early, as he will have difficulty making up many orders if they come in too late.

At this point I am going to ask Mr. Denman Moody, the Vice-Chairman of the Open Forum Committee, to take over with respect to the remaining part of this program.

Report of Practice and Procedure Committee

Chairman: WILLIAM E. KNEPPER
Columbus, Ohio

A SURVEY OF DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

Foreword

THIS survey, prepared by the Committee on Practice and Procedure of the International Association of Insurance Counsel, is intended to provide a handbook for the practitioner in the federal courts, supplying in brief form a working outline of the subject with practical suggestions and citations to leading cases.

No attempt has been made to refer to all the cases in point. Likewise, editorial discussion has been reduced to a minimum. For more comprehensive treatments of the subjects herein mentioned, the reader is referred to Federal Practice and Procedure (Rules Edition) by Barron and Holtzoff, Moore's Federal Practice (Second Edition), Bender's Federal Practice Manual, Federal Rules Digest, edited by Pike, Fischer and Willis, United States Code Annotated, Federal Code Annotated, and other similar works.

I. DEPOSITIONS

A. *Pending Action.*

1. *Right to Take*

The right to take depositions either for purpose of discovery or for use as evidence, or for both purposes, by any party, is clearly permitted under Rule 26.

No study of the Rules of Discovery is complete without a careful reading of *Hickman v. Taylor,* Pa. 1947, 67 S. Ct. 385, 329 U. S. 495, 91 L. Ed. 451. See also *Engl v. Aetna Life Ins. Co.* (C. C. A. 2d. 1943), 139 F. 2d. 469, *Benal Theatre Corp. v. Paramount Pictures,* (D. C. Ill. 1947), 9 F. R. D. 726, *Dulansky v. Iowa-Illinois Gas & Elec. Co.* (D. C. Iowa, 1950), 10 F. R. D. 146, *O'Donnell v. Breuninger,* (D. C. D. C. 1949), 9 F. R. D. 245.

This right applies to every type of action within the coverage of the Federal Rules, even to actions by or against the United States. *Bank Line Ltd. v. United States* (C. C. A. 2d. 1947), 163 Fed. 2d. 133, *Walling v. Richmond Screw Anchor Co., Inc.* (E. D. N. Y. 1943), 4 F. R. D. 265, *Evans v. United States,* (W. D. La. 1950) 10 F. R. D. 255, (Suit under Tort Claims Act).

Before the 1946 amendments to Rule 26 (a), depositions could be taken only upon leave of court, after jurisdiction was obtained over defendant or over property which was the subject of the action, unless and until answer had been served. Presently, leave of court is necessary only where plaintiff serves notice to take depositions at any time within 20 days after commencement of the action.

The defendant may take depositions without leave of court as soon as the action is commenced, and the plaintiff may proceed without leave at the expiration of the 20-day period. The theory behind the 20-day period is to allow the defendant to become conversant with the action and to secure counsel.

What necessary showing must be made by plaintiff to secure leave to take depositions before the expiration of the 20-day period is discussed in *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.* (S. D. N. Y. 1949), 9 F. R. D. 432 and criticism of said case in Moore's Federal Practice, 2nd Ed. Vol. 4, page 1047.

The time from which the 20-day period begins to run, or in other words, "Commencement of Action," is date of filing of complaint with Clerk of Court, not date of service. Thus notice to take depositions more than 20 days after filing of complaint but less than 20 days after service thereof, is valid even though taken without leave of Court. *Edwin H. Morris & Co. v. Warner Bros. Pictures, Inc., et al,* 10 F. R. D. 236, (D. C. N. Y. S. D. 1950).

Priority in taking of depositions is given to the party who first serves notice, absent special circumstances. *Morris v. Warner,* supra.

2. *Whose deposition may be taken*
(a) *Parties*

Rule 26 (a) provides for taking of deposition of any person whether a party or mere witness. On the other hand interrogatories under Rule 33 may be served only on an adverse party.

A corporation, partnership or association, which is a party, may be examined through an officer, director or managing agent, providing that status exists at time of taking the deposition. *Parrazzo v. Royal Mail Lines, Ltd.* (S. D. N. Y. 1944), 8 F. R. Serv. 26a. 33, Case 1. But see *Cohen v. Penn. R. Co.* (S. D. N. Y. 1939) 30 F. Supp. 419. If that status does not exist at time of notice such a person can be examined as mere witness. *Bennett v. The Westover, Inc.* (S. D. N. Y. 1938) 27 F. Supp. 10.

A public corporation, such as a municipality, may be examined through proper officer. *Joy Mfg. Co. v. City of New York* (S. D. N. Y. 1939), 30 F. Supp. 403. *Conneway v. City of New York* (E. D. N. Y. 1940) 32 F. Supp. 54.

An engineer and fireman of an engine involved in an accident, and of a nearby switch engine and a crossing watchman, are not "agents" of railroad under Rule 33 providing for interrogatories to parties. *Waider v. Chicago R. I. & P. Ry. Co.* 10 F. R. D. 263, (S. D. Iowa, 1950). This case details the status of such employees under the discovery rules.

The United States government and its officers are subject to discovery rules and under the Tort Claims Act documents in its possession, not privileged, must be produced. *Evans v. U. S.* 10 F. R. D. 255, (W. D. La. 1950). A party's attorney may be examined provided the subject matter of the examination is not privileged. *Jenkins v. Penn. R. R. Co.* (E. D. N. Y. 1949), 9 F. R. D. 297. A municipality may be examined through its proper officer having knowledge of the facts. *Conneway v. City of New York* (D. C. N. Y. 1939) 32 F. Supp. 54.

(b) *Witnesses not parties*

The deposition of a mere witness may be taken either by oral examination or by written interrogatories under rules 26, 30 and 31. *Nekrasoff v. U. S. Rubber Co. et al.* (S. D. N. Y. 1939), 27 F. Supp. 953, *Samuel Goldwyn, Inc. v. United Artists Corp.* (S. D. N. Y. 1940) 35 F. Supp. 633.

Rule 26 (a) makes no distinction between the taking of the deposition of a party or of a witness. It expressly provides that the "testimony of any person, including a party" may be taken by deposition.

(c) *Insurer*

An insurance company which is a party, like any other private corporation, may be examined through its officers. *Kulich v. Murrary, et al.* (S. D. N. Y. 1939), 28 F. Supp. 675, *Colpak v. Hetterick* (E. D. N. Y. 1941), 40 F. Supp. 350. *Cortese v. British Ministry of War Transport Representative in United States,* (S. D. N. Y. 1945) 8 F. R. Serv. 30 A. 22, case 4.

(d) *Miscellaneous*

Is rule 26 broad enough to permit a party to take his own deposition? And may he introduce his own deposition at the trial? See interesting discussion on this point in Moore's Federal Practice, Second Edition, Vol. 4, page 1195, *Arnstein v. Porter,* (C. C. A. N. Y. 1946), 154 F. 2d. 464.

3. *Attendance of Witnesses— Production of Documents*

Rule 26 (a) provides that the attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

Rule 26 (b) provides that unless otherwise ordered by the Court, as provided by Rule 30 (b) or (d), (which in turn protects parties and deponents against unnecessary, unusual, and prejudicial examinations or examinations taken in bad faith or for purposes of annoyance, embarrassment, oppression, etc.) the deponent may be examined regarding any matter, not privileged, which is relevant, whether related to the claim or defense of the examining party or any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things. It also provides for the identity and location of persons having knowledge of relevant facts.

Under the rule it is not ground for objection that the testimony sought will be inadmissible at trial if it is reasonably calculated to lead to discovery of admissible evidence.

While Rule 26 provides for securing knowledge of the existence and location of books, documents, etc., Rule 34 provides for securing an order against any party, upon motion of any party showing good cause therefor, and upon notice to all other parties, (subject again to Rule 30 (b) supra) for the production, inspection and copying of documents, papers, accounts, tangible things, etc., which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in the possession, custody or control of the party against whom the order is secured. The order will specify the time, place and manner of inspection, etc., and may prescribe such terms and conditions as are just.

(a) *Parties*

It is not necessary to serve a subpoena upon a party to the action, since under Rule 37 adequate sanctions can be taken against him if he fails to respond to notice. *Collins v. Wayland et al,* (C. C. A. 9th, 1944), 139 F. 2d. 677. *Peitzman v. City of Illmo,* (C. C. A. 8th, 1944), 141 F. 2d 956, *Barili v. Bianchi,* 6 F. R. D. 350, *Millinocket Theatre, Inc. v. Kurson* (D. Me. 1940), 35 F. Supp. 754, *Havell v. Time, Inc.,* (S. D. N. Y. 1940) 1 F. R. D. 439. However, this rule does not hold for mere employees of a party, and a party cannot be compelled to produce his employees upon simple notice. Such witnesses may be compelled to attend as provided by Rule 45. *Czuprynski v. Shenango Furnace Co.* (W. D. N. Y. 1942) 2 F. R. D. 412. *Mulligan v. Eastern Steamship Lines, Inc.,* (S. D. N. Y. 1946), 6 F. R. D. 601.

Attendance of party is secured by notice, and of mere witness by subpoena. *Farr v. Delaware L. & W. R. Co.* (D. C. N. Y. 1947), 7 F. R. D. 494.

(b) *Corporate agents*

A corporate party's officer, director or agent comes under the same rule as a party and a subpoena is unnecessary. *Mulligan v. Eastern S. S. Lines,* (D. C. N. Y. 1946), 6 F. R. D. 601, *In re Chilcote Co.,* (D. C. Ohio 1949), 9 F. R. D. 571, affirmed 177 F. 2d. 375.

(c) *Other persons*

A mere witness, as distinguished from a party or an officer of a party, may be compelled to submit to examination pursuant to Rule 26, but his attendance can only be compelled by subpoena issued and served in accordance with Rule 45 (d). *Chemical Specialties Co. Inc. v. Ciba Pharmaceutical Products, Inc.,* 10 F. R. D. 500, (N. J. 1950), *Czuprynski v. Shenango Furnace Co.* (D. C. N. Y. 1942), 2 F. R. D. 412.

(d) *Documents in control of party*

Good cause is considered shown for the production of a statement of the plaintiff in hands of the defendant where the plaintiff contends that his statement was taken when he was in the hospital under influence of medicines. *Irvine v. Safeway Trails, Inc., et al,* 10 F. R. D. 586, (E. D. Penn. 1950). Names of passengers in a bus, which was in a collision, who had given statements to the defendant and a brief statement of factual matters known to such witnesses have been ordered given to plaintiff. *Irvine v. Safeway,* supra.

Production of documents and records is not provided for by Rule 26, only the fact of their existence and custody. For production and inspection Rules 34 and 45 (b) and (d) are proper. *Chemical Specialties Co. v. Ciba Pharmaceutical Products, Inc.* 10 F. R. D. 500 (N. J. 1950).

But there is a tendency of some courts to treat a simple notice to produce contained in notice of examination, as sufficient to require the production of documents. *Sekely v. Salkind,* 10 F. R. D. 503, (S. D. New York, 1950), *Smith v. Bentley,* 9 F. R. D. 489, (S. D. New York, 1949), and *Society of Independent Motion Picture Producers v. United Detroit Theatre Corp.,* 8 F. R. D. 453, (E. D. Mich. 1948).

The production by a party of any documents, including statements of witnesses, either for inspection or making a copy, is predicated upon first showing good cause therefor. In the absence of good cause they will not be ordered produced. *North et al v. Lehigh Valley Transit Co.,* 10 F. R. D. 39, (E. D. Penn. 1950).

For an exposition of the prerequisites necessary to secure information under interrogatories and for production of documents, under Rules 33 and 34 respectively, see *Herbst v. Chicago, Rock Island & Pacific R. R. Co.,* 10 F. R. D. 14, (S. D. Iowa, 1950), wherein certain statements from

employees were ordered produced and a motion for the production of certain other statements was denied.

A defendant is entitled to the names of witnesses to a railroad collision which are known to the plaintiff. *Pacific Intermountain Express Co. v. Union Pac. R. R. Co.,* 10 F. R. D. 61, (W. D. Mo. 1950).

(e) *Other documents*

Where documents and other tangible things are in the possession of a witness, and not in possession of a party, a subpoena under Rule 45 is indicated. See discussion in *U. S. for Use of Tilo Roofing Co. v. J. Slotnik Co.,* (D. C. Conn. 1944), 3 F. R. D. 408.

4. *Purpose of Taking and Use of Depositions*

Rule 26 (a) provides that depositions may be taken for the purpose of discovery, or for use as evidence, or for both purposes.

(a) *For discovery*

The liberality of the "relevancy" rule is discussed in *Hickman v. Taylor,* 329 U. S. 495, 67 S. Ct. 385, 91 L. Ed 451 (Penn.) and *Chemical Specialties Co., Inc. v. Ciba Pharmaceutical Products, Inc.,* 10 F. R. D. 500 (N. J. 1950).

The fundamental purpose of Rule 26 and its allied deposition and discovery rules is to allow a broad search for facts, the ascertaining of the identity of persons having information bearing on the subject matter and the existence and contents of records and documents, all to the end that the parties may be aided in the preparation and presentation of their cases. In this preliminary inquiry, admissibility of the information should not be the test, but rather that the information elicited is relevant and may lead to admissible evidence. *Hickman v. Taylor,* supra, *Engl v. Aetna Life Ins. Co.,* (C. C. A. 2, 1943), 139 F. 2d. 469, *Mahler v. Penn. R. R. Co.* (N. Y. 1945) 8 Fed. Rules Serv. 33, 351, Case 1, *Benal Theatre Corp. v. Paramount Pictures* (N. D. Ill. 1947), 9 F. R. D. 726, *Dulansky v. Iowa-Illinois Gas & Elec. Co.,* (D. C. Iowa, 1950), 10 F. R. D. 146.

For a beneficial discussion of the general history and purpose of the Deposition and Discovery Rules see Moore's Federal Practice, 2nd Edition, Vol. 4, p. 1012 et seq., and the Notes of Advisory Committee on Rules, and historical background to be found in Title 28 U. S. C. A., "Federal Rules of Civil Procedure."

(b) *For use as evidence*

Rule 26 (d) provides that at a trial or hearing any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party present or represented at the taking of the deposition, or who had due notice thereof, for the following purposes:

(1) For the purpose of contradicting or impeaching deponent as a witness,
(2) For any purpose by an adverse party if the deponent was a party in the suit, or at time of deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party.
(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds:
   a. That the witness is dead,
   b. That he is out of the United States, or is a greater distance than 100 miles from the place of trial or hearing, unless it appears that his absence was procured by the party offering the deposition,
   c. That the witness cannot physically attend because of age, sickness, imprisonment, etc.
   d. That the party offering the deposition cannot procure the attendance of the witness by subpoena.
   e. That exceptional circumstances exist.

Rule 26 (f) provides that a person is not made a witness for the party taking his deposition, but that the introduction of the testimony of the witness for any purpose, other than to contradict or impeach him, does make him a witness for the party introducing the deposition. This does not apply, however, to the use by an adverse party of a deposition of a party or one acting as officer, director, etc., of a party.

Any party may use a deposition in accordance with Rule 26 (d) and not merely the party taking the deposition. *Crist v. U. S. War Shipping Administration,* (E. D. Pa. 1946), 64 F. Supp. 934.

A deposition may be used as substantive or original evidence only against a party present or represented at the taking, or who had due notice thereof. *United States*

v. Aluminum Co. of America, (S. D. N. Y. 1939), 27 F. Supp. 820.

A party may use only a part of deposition at the trial. But if he does so, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts. *United States v. Aluminum Co. of America,* (S. D. N. Y. 1939), 1 F. R. Serv. 26 d. 52 case 1.

As to the use of the deposition for contradiction and impeachment, see *Pfotzer v. Systems, Inc.,* (C. C. A. 2d 1947) 162 F. 2d. 779, and *Lewis v. United Air Lines Transport Corp.,* (D. C. Conn. 1939), 27 F. Supp. 946.

For an explanation of the 100 mile rule and the meaning of "procurement of absence" see Moore's Fed. Practice, Vol. 2, pp. 2460-2462 with Cumulative Supplement, pp. 2492-2493, and *Weiss v. Weiner,* 10 F. R. D. 387, (D. C. Maryland, 1950), in which depositions were allowed in evidence where the defendant was living more than 100 miles from the place of the trial.

Physical incapacity, death, etc., are discussed in *Inland Bonding Co. v. Mainland National Bank of Pleasantville,* (D. C. N. J. 1944), 3 F. R. D. 438.

Exceptional circumstances are considered in *Odell v. Miller, et al.,* 10 F. R. D. 528, (W. D. Mich. 1950), wherein the fact that if the deponent returned to Michigan he would be arrested under a warrant of attachment, caused the court to receive the deposition in evidence.

Court will weigh motions to use depositions as evidence because of exceptional circumstances under the injunction in the rule "with due regard to the importance of presenting the testimony of witnesses orally in open Court." *Armstein v. Porter,* (C. C. A. N. Y. 1946), 154 F. 2d. 464.

B. Before action and pending appeal

1. Perpetuation of Testimony

(a) *Necessity for perpetuation*

If the court is satisfied that the perpetuation of testimony may prevent a delay or failure of justice, it shall make an order designating or describing the persons whose depositions may be taken, specifying the subject matter of the examination and whether the depositions shall be taken on oral or written interrogatories. Rule 27 (a) (3). To justify such order, the party seeking it must show that the testimony will be material and competent, that depositions cannot be taken in the ordinary manner, and that there is danger that the testimony may be lost by delay. *Arizona v. California,* 292 U. S. 341, 78 L. Ed. 1298, 54 S. Ct. 735, *Petition of Ferkauf,* 7 F. R. Serv. 27a. 14, Case 2; 3 F. R. D. 89, (D. S. C. D. N. Y. 1943).

(b) *Whose testimony may be perpetuated*

Aged or infirm parties or witnesses, ill or severely injured persons or persons who will likely depart the jurisdiction of the court before the action can be commenced may be examined under this procedure according to the trend of the decisions. *Mosseller v. U. S.,* 158 F. 2d. 380, (C. C. A. 2d. 1946).

(c) *Petition, notice and service*

At least 20 days before the hearing, the petitioner must serve a notice, within or without the district or state, stating that he will apply to the court, at a time and place named therein, for the order described in the petition, a copy of which must be served with the notice. Rule 27 (a) (2). Service should conform to Rule 4 (d), but if this cannot be done with due diligence, the court may order service by publication or otherwise and shall appoint, for persons not served under Rule 4 (d) an attorney to represent them in case they are not otherwise represented.

(d) *Procedure*

At the hearing, upon proof of the allegations of the petition the court will designate or describe the persons whose depositions may be taken, specifying the subject matter of the examination and whether the depositions shall be upon oral examination or written interrogatories. Thereafter the procedure shall be in accordance with the order. Rule 27 (a) (3).

(e) *Use of deposition*

A deposition so taken or which would be admissible in evidence in the courts of the state in which it is taken, may be used in any action involving the same subject matter subsequently brought in a United States district court, to the same extent as provided in Rule 26 (d). 15 Tenn. Law Review 737, Rule 27 (a) (4).

2. Discovery

(a) *As aid to drafting complaint*

This rule may not be used for discovery purposes in order to enable the petitioner

to frame a complaint. *Petition of Johanson Glove Co., Inc.*, 9 F. R. Serv. 27a. 14, Case 1; 7 F. R. D. 156, (D. C. E. D. N. Y. 1945), *Petition of Exstein*, 3 F. R. D. 242; *Petition of Ferkauf*, 3 F. R. D. 89, 7 F. R. Serv. 27a. 14, Case 2, (D. C. S. D. N. Y. 1943).

(b) *Use of deposition*

The use of a deposition taken under Rule 27 (a) is limited by Rule 26 (d).

3. *Pending appeal*

(a) *Motion and procedure*

If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was taken may, on motion, permit the taking of depositions to perpetuate testimony for use in the event of further proceedings in such court. Such motion shall be upon notice and shall show the names and addresses of the witnesses, the substance of their expected testimony, and the reasons for perpetuating their testimony. Rule 27 (b).

(b) *Order—scope*

If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may, by order, allow the depositions to be taken and such order may also provide for the discovery and production of documents and things for inspection (Rule 34) and for physical and mental examinations (Rule 35).

(c) *Use of deposition*

Such depositions may be used as provided in Rule 26 (d).

(d) *Upon reversal*

After reversal of a judgment and pending the new trial the procedure for taking depositions is that prescribed by Rule 26. *Feldman v. Connecticut Mut. Life Ins. Co.*, 57 F. Supp. 70, (D. C. E. D. Mo. 1944).

C. *Upon Oral Examinations*

1. *Notice*

(a) *Contents*

The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a description sufficient to identify the witness or the particular class or group to which he belongs.

The notice need not state the subject matter of the examination. *U. S. ex rel. Edlestein v. Brussell Sewing Machine Co.*, 3 F. R. D. 87 (D. C. N. Y. 1943), *Lenerts v. Rapidol Distributing Corporation*, 3 F. R. D. 42 (D. C. N. Y. 1942), *Freeman v. Hotel Waldorf-Astoria Corporation*, 27 Fed. Supp. 303, (D. C. N. Y. 1939).

The opposing parties' remedy is by seeking limitation of the scope of the examination. *Saviolis v. National Bank of Greece*, 25 F. Supp. 966 (D. C. N. Y. 1938).

The examination is not limited to the specific matters which are set forth in Rule 26b. *Madison v. Cobb*, 29 F. Supp. 881, (D. C. Pa. 1939). It need not state the name of the officer before whom the deposition is to be taken, although this is perhaps the better practice. *Norton v. Cooper-Jarrett, Inc.*, 1 F. R. D. 42 (D. C. N. Y. 1940).

As to sufficiency of description, the following have been held to be valid: "Superintendent or caretaker in charge of premises," *Burris v. American Chicle Co.*, 1 F. R. D. 9 (E. D. N. Y. 1939); "Manager of the Claims Department," *Kulick v. Murray*, 28 F. Supp. 675; "Station Master," *Brizel v. Pennsylvania Ry. Co.*, 4 F. R. Serv. 26a 33, Case 1 (E. D. N. Y. 1940).

There is a conflict as to the sufficiency of a notice which calls for "such officers or employees" of a corporation "as may have knowledge of the facts." This was held proper in *Sterm v. Exposition Greyhound, Inc.*, 1 F. R. D. 696 (E. D. N. Y. 1941). But contra see Note 21, page 2019, Moore's Fed. Practice.

(b) *Time*

The notice must state the time and place of the taking of the deposition. Rule 30 (a). Upon motion of any party upon whom the notice is served the court may for good cause enlarge or shorten the time, and likewise may change the place. Rule 30 (b).

The term "reasonable notice" is sometimes fixed by local court rule, such as prevails in the Tenth Circuit, which prescribes five days, subject to order of court lengthening or shortening. 28 U. S. C. 639 also calls for "reasonable notice," and under this statute it has been held that the chief factors are distance, number of witnesses and facilities for communication. *American Exchange Bank of New York v. First National Bank of Spring Falls*, 82 Fed. 969. Ordinarily five days is recog-

nized as reasonable, plus one day for each three hundred miles between the place of taking and the court where action is pending.

Notice which can only be obeyed by counsel absenting himself from trial of another case has been held unreasonable. *Allen v. Blunt,* Fed. Cas. No. 217.

A series of notices for taking depositions in different towns at the same time has been held unreasonable. *Uhle v. Burnham,* 44 Fed. 729; *Mims v. Central Manufacturers Mutual Ins. Co.,* 178 Fed. 2d. 56.

(c) *Place of taking*

After notice is served, upon motion made either by a party or by the proposed witness, and for good cause, the court may order that the deposition be taken at some place other than that designated in the notice or that it may be taken only on written interrogatories. Rule 30 (b).

The particular facts of each case will govern the court's action in determining the selection of a place for examination in order to minimize hardship upon the parties or the witness. See Annotation, McChord, The Place for Taking the Deposition of Adversary under Federal Rules, 4 Federal Rules Decisions 374.

Generally speaking, a plaintiff who selects the district for the action will generally be required to appear for examination in that district. *Producers Releasing Corporation de Cuba v. P. R. C. Pictures,* 8 F. R. D. 254 (D. C. N. Y. 1948).

2. *Orders for Protection*

(a) *Motion*

Motions for orders for the protection of parties and documents must be seasonably made, either by a party or by the person to be examined. Rule 30 (b).

This has been held to mean before the date set for the deposition, and the order is to be made by the court in which the action is pending, and not by the court for the district where the deposition is taken, as in the case of a motion under Rule 30 (d) where a motion is made to terminate or limit the examination if it is being conducted in bad faith or in an unreasonable manner. *Cinema Amusements v. Loew's, Inc.,* 85 F. Supp. 319, (D. C. Delaware, 1949).

The motion will be denied unless it is clearly shown that the need for protection exists, and a mere suspicion that the examination will proceed beyond proper limits is not sufficient to justify the granting of the order. *Stankewicz v. Pillsbury Flour Mills Company,* 26 F. Supp. 1003, (D. C. N. Y. 1939), *Goldberg v. Raleigh Manufacturers,* 28 F. Supp. 975, (D. C. Mass. 1939), *Union Central Life Insurance Company v. Burger,* 27 F. Supp. 556 (D. C. N. Y. 1939).

If the order is denied under Rule 30 (b), it is done without prejudice to the movant to apply to the court of the district in which the testimony is being taken for protection under Rule 30 (d) if the need arises during the course of the examination. *Nekrasoff v. U. S. Rubber Company,* 27 F. Supp. 953, (D. C. N. Y. 1939).

(b) *What orders may be made*

The court may order that a deposition shall not be taken, the procedure being to move to vacate notices of the taking of testimony. *Lynch v. Henry Pollakinc,* 1 F. R. D. 496, (D. C. N. Y. 1940).

Reasons for this order have included a contention that the information has already been obtained by prior depositions or other means, that stipulations have been offered, that the examination would be unduly lengthy, that it would be an undue hardship upon the person testifying, and that the examination would cause undue labor expense and delay. *Piccard v. Sperry Corporation,* 30 F. Supp. 171, (D. C. N. Y. 1940), *Cumberland Corporation v. McLelland Stores Company,* 27 F. Supp. 994 (D. C. N. Y. 1939).

The court may order that the deposition be taken by written interrogatories rather than by oral examination, although this is highly discretionary, and courts generally recognize the value of an oral deposition. *Clair v. Philadelphia Storage Battery Company,* 27 F. Supp. 777 (D. C. Penn. 1939).

In some instances, courts have ordered testimony taken on written interrogatories where the expense of travel to the place where the deposition is to be taken would be unreasonable, and in some instances have given the party requesting an oral examination the choice of either taking the deposition by written interrogatories or paying the other party's expense. *Boone v. Wynne,* 7 F. R. D. 22, (D. C. D. C., 1947), *Moore v. George A. Hormel & Company,* 4 F. R. D. 15, (D. C. N. Y. 1942), *Houghton Mifflin Company v. Stackpole Son,* (D. C. N. Y. 1940), *Gibson v. International Freighting Corp.,* 173 F. 2d. 591 (3rd Cir. 1949).

The rule provides that orders may be entered directing that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters and, in this connection, orders have been made to avoid an abusive use of the rule. *Hiss v. Chambers,* 8 F. R. D. 480, (D. C. Md. 1948). This rule has been applied to prohibit the disclosure of secret processes, even though not privileged as a matter of law, although this is highly discretionary with the court. *Floridin Company v. Attapulgus Clay Company,* 26 F. Supp. 968 (D. C. Del. 1939), *Ferguson v. Ford Motor Company,* 8 F. R. D. 414, (D. C. N. Y. 1948).

(c) *Discretion of court*

All of the above provisions are highly discretionary. Rule 30 (b) provides that the cout, in its discretion, may order that the deposition shall not be taken at all, may order that it be taken only at some designated place different than that stated in the notice, that it may be taken only on written interrogatories, that certain matters shall not be inquired into, that the scope of the examination shall be limited, that no one shall be present at the taking of the testimony other than the parties and their officers or counsel, that the deposition shall be sealed, to be opened only by court order, that secret processes need not be disclosed, that parties shall simultaneously file specified information in sealed envelopes to be opened as directed by the court, or that any other action be taken which justice requires to protect the party or witness from annoyance, embarrassment or oppression. The exercise of these powers is clearly in the sound discretion of the court. See annotation 16 California State Bar Journal 190 (1941).

3. *Procedure*

(a) *Record of Examination*

Rule 30 (c) governs the conduct of the oral examination, providing that the officer before whom the deposition is taken shall swear the witness and shall personally record the testimony, or shall record the same by someone acting under his direction and in his presence. *Michels v. Ripley,* 1 F. R. D. 332, (D. C. N. Y. 1940), *Pezza v. Williams-Bauer Corporation,* 3 F. R. D. 355 (D. C. N. Y. 1942).

If he desires, the witness may have his own stenographer present at the examination. *Hart v. Mechanics & Traders Insurance Company of Hartford, Connecticut,* 46 F. Supp. 166 (D. C. La. 1942).

Evidence which is objected to is taken subject to the objections. *Dellefield v. Blockdel Realty Company,* 40 F. Supp. 212 (D. C. N. Y. 1941).

If a party served with notice of taking a deposition does not desire to participate in the oral examination, he may transmit written interrogatories to the officer who is required to propound these interrogatories to the witness and record the answers verbatim. See Annotation 15 Tennessee Law Review 737.

(b) *Submission to witness—changes*

When the testimony is transcribed, the deposition is submitted to the witness for his examination, unless the examination and reading of the deposition by the witness are waived. Any changes made by the witness are entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. It is not clear whether this provision permits a witness to change the substance of his testimony, or whether it merely provides for the correction of errors made in transcribing the testimony. 38 Columbia Law Review 1179, *DeSeversky v. Republic Aviation Corporation,* 2 F. R. D. 113 (D. C. N. Y. 1941).

If the witness does not sign the deposition, the officer signs the same, stating either that signature has been waived, or that the witness is unable or has refused to sign, and giving the reason, if any.

(c) *Certification and filing*

Rule 30 (f) requires that the officer certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony. The officer then seals the deposition and marks it as provided by the rule, and then files it with the clerk of the court in which the action is pending either in person or by sending it by registered mail to such clerk for filing. The officer is required to furnish a copy of the deposition to any party or to the witness upon the payment of the reasonable charges therefor. Upon the demand of an adverse party, a party at whose instance a deposition is taken must have the testimony transcribed and filed, even though it is not helpful to him. *Burke v. Central Illinois Securities Corp.,* 9 F. R. D. 426, (D. C. Del. 1949).

(d) *Irregularities*

Rule 30 (g) proivdes a method of penalizing a party who serves notice of taking of a deposition and does not attend, or fails to serve a subpoena and the witness thereby does not attend. The rule provides that in such an instance the court may order the party giving the notice to pay the reasonable expenses incurred by another party who attends the taking of the deposition.

D. *Upon Written Interrogatories*

If the person who is to answer the interrogatories is an adverse party, the procedure may be under either Rule 31 or Rule 33. *Holler v. General Motors Corporation,* (D. C. Mo. 1944) 3 F. R. D. 296.

Theoretically, procedure under Rule 31 is more effective than that under Rule 33 but, theoretically and practically, both are less effective than oral examination under Rule 30.

1. *Service*

Rule 31 (a) provides for service of notice and interrogatories upon all parties. Rule 5 prescribes the manner of service.

(a) *Notice*

The information to be included in the notice is set forth in Rule 31 (a). Rule 32 (a) provides that all errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) *Interrogatories*

Rule 32 (c) (3) provides that objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(c) *Subsequent Interrogatories*

Rule 31 (a) provides for the service of such additional interrogatories as may be necessary and the times for such service. Objections to these subsequent interrogatories must be taken as provided in Rule 32 (c) (3).

2. *Orders for Protection*

Rule 31 (d) provides that after the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Rule 30 (b) and (d) set forth in detail what protective orders may be made and the procedure with respect thereto.

The court may order all or a portion of the proof to be taken upon oral, rather than written, interrogation, if it appears that justice so requires. *Winograd Bros. v. Chase Bank,* (D. C. N. Y. 1939) 31 F. Supp. 91, *U. S. v. National City Bank of New York* (D. C. N. Y. 1940), 1 F. R. D. 367.

Upon application, prior to taking of deposition, the court may preserve objections to interrogatories for further consideration after the interrogatories have been answered, *Gitto v. "Italia," Societa Anonima Di Navigazione, Genova,* (D. C. N. Y. 1940) 31 F. Supp. 567 or it may allow the filing of further interrogatories after answers have been filed to direct and cross-interrogatories, *Baron v. Leo Feist, Inc.* (D. C. N. Y. 1946) 7 F. R. D. 71. Also, the court may allow oral examination in the event responses to written interrogatories prove unsatisfactory; *U. S. v. National City Bank of New York* (D. C. N. Y. 1940) 1 F. R. D. 367, *J. C. Nichols Co. v. Mid-States Freight Lines* (D. C. Mo. 1949) 9 F. R. D. 553.

E. *Costs*

1. *Expense of taking taxable as costs*

No provision is made in the rules governing depositions for the taxation as costs of expenses incurred in the taking of depositions. Rule 54 (d), however, covering costs in general, is construed to include deposition expense and, except in several districts where local rules or statutes are applicable, *Amerman v. Butte Copper & Zinc Co.,* 9 F. R. Serv. 26a. 71, case 2, 5 F. R. D. 30 (D. C. Mont. 1945), the taxing of deposition expense as costs lies within the discretion of the trial court, and its decision will not be overruled except

for abuse of discretion. *Harris v. Twentieth - Centuary Fox Film Corp.*, 7 F. R. Serv. 26a. 71, case 5, 139 F. 2d. 571, (CCA 2nd 1943).

Deposition expenses, such as witness fees and mileage, are normally first paid by the party taking the deposition. Rule 45 (c); *Pezza v. Williams-Bauer Corp.*, 7 F. R. Serv. 26b. 1, case 1, 3 F. R. D. 355, (D. C. S. D. N. Y. 1942); c.f., *Odum v. Willard Stores, Inc.*, 1 F. R. D. 680, (D. C. D. C. 1941). Expenses of depositions taken by the prevailing party may be taxed as costs in the cause, if the court finds the depositions to have been reasonably necessary when taken, *Quaker Oats Co. v. General Mills, Inc.*, 7 F. R. Serv. 26a 71, case 2 (D. C. N. D. Ill. 1943); *Schmitt v. Continental-Diamond Fibre Co.*, 2 F. R. Serv. 26a. 71, case 1, 1 F. R. D. 109 (D. C. N. D. Ill. 1940), even though the action was later dismissed before trial, *Curacao Trading Co. v. Federal Ins. Co.*, 7 F. R. Serv. 26a. 71, case 1, 3 F. R. D. 261 (D. C. S. D. N. Y. 1942) affd. 137 F. 2d 911 (CCA 2nd 1943), or the deposition not read into evidence at trial, *Donato v. Parker Pen Co.*, 9 F. R. Serv. 26a. 71, case 1, 7 F. R. D. 148 (D. C. E. D. N. Y. 1945), or not used because of the elimination of the issue at a pre-trial hearing. *Federal Deposit Ins. Corp. v. Fruit Growers Serv. Co.*, 5 F. R. Serv. 54d. 143, case 4, 2 F. R. D. 131, (D. C. E. D. Wash. 1941). But these deposition expenses are not taxable as costs if the court finds that the depositions were taken solely for the benefit of the prevailing party and not actually used or intended to be used in the determination of the case. *Republic Machine Tool Corp. v. Federal Cartridge Corp.*, 9 F. R. Serv. 26a. 71, case 3, 5 F. R. D. 388 (D. C. D. Minn. 1946); *Andresen v. Clear Ridge Aviation, Inc.*, 12 F. R. Serv. 54d. 143, case 1, 9 F. R. D. 50 (D. C. D. Neb. 1949).

2. *Expense of parties*

All parties over whom the court has acquired jurisdiction may be required to be present within the jurisdiction for the taking fo their depositions by the adverse party, *Collins v. Wayland*, 139 F. 2d. 677 (CCA 9th 1944); *Producers Releasing Corp. de Cuba v. PRC Pictures, Inc.*, 8 F. R. D. 254 (D. C. S. D. N. Y. 1948), modified in 176 F. 2d. 93 (CA 2nd 1949). In cases involving non-residents, courts will consider the hardships which might result and will condition their orders for the taking of their depositions accordingly, *Norton v. Cooper Jarrett, Inc.*, 1 F. R. D. 92 (D. C. N. D. N. Y. 1938); *Society of Independent Motion Picture Producers v. United Detroit Theatres Corp.*, 12 F. R. Serv. 30b. 341, case 1, 8 F. R. D. 453, 457 (D. C. E. D. Mich. 1948).

A non-resident plaintiff is generally required to be present in the district in which suit is brought for the taking of his deposition without prepayment by the defendant of his travel expenses, *Solomon v. Teitelbaum*, 13 F. R. Serv. 30b. 41, case 2, 9 F. R. D. 515 (D. C. E. D. N. Y. 1949); c.f. *Picking v. Pennsylvania R. Co.*, 11 F. R. D. 71 (D. C. M. D. Pa. 1951); *Fruit Growers Co-op v. California Pie & Baking Co.*, 7 F. R. Serv. 26a. 31, case 1, 3 F. R. D. 206 (D. C. E. D. N. Y. 1942), *Society of Independent Motion Picture Producers v. United Detroit Theatres Corp.*, 12 F. R. Serv. 30b. 341, case 1, 8 F. R. D. 453, 455 (D. C. E. D. Mich. 1948); *Societe Internationale Four Participations Industrielles et Commerciales S. A. v. Clark*, 12 F. R. Serv. 37d. 1, case 1, 8 F. R. D. 565 (D. C. D. C. 1948). But the trial court has the power to make any order necessary for the protection of the parties, Rule 30 (b); *Messelt v. Security Storage Co.*, 10 F. R. D. 509 (D. C. D. Del. 1950); *Patrick v. Eastern S. S. Lines, Inc.*, 11 F. R. Serv. 30b. 341, case 1, 8 F. R. D. 421 (D. C. S. D. N. Y. 1948); *Barili v. Bianchi*, 10 F. R. Serv. 30a. 61, 6 F. R. D. 350 (D. C. N. D. Cal. 1946), including one for payment of plaintiff's travel expenses to and from the forum, which payment may be ordered to be reimbursed later if defendant prevails in the case, *Boone v. Wynn*, 10 F. R. Serv. 30b. 32, case 3, 7 F. R. D. 22, 75 Wash. L. Rep. 527 (D. C. D. C. 1947). Courts tend to limit the application of the rule requiring plaintiff to give his deposition in the place of the forum in cases in which interrogatories could be used to accomplish the same result as an oral deposition, *Butts v. Southern Pac. Co.*, 10 F. R. Serv. 30b. 341, case 1, 7 F. R. D. 194 (D. C. S. D. N. Y. 1947), and in cases in which the non-resident plaintiff would suffer a hardship in coming to the forum because of limited funds for traveling expenses or because of a physical disability which would necessarily make traveling difficult, *Sullivan v. Southern Pac. Co.*, 7 F. R. D. 206 (D. C. S. D. N. Y. 1947); *Stevens v. Minder Const. Corp.*, 7 F. R. Serv. 30b. 31, case 2, 3 F. R. D. 498 (D. C. S. D. N. Y. 1943). If a financial hardship would result the deposition may be allowed, conditioned on defendant's ad-

vancing plaintiff travel and hotel expenses, which expenses may later be taxed as costs, *Stevens v. Minder Const. Corp.*, 7 F. R. Serv. 30b. 31, case 2, 3 F. R. D. 498 (D. C. S. D. N. Y. 1943); *Jones v. Pennsylvania Greyhound Lines, Inc.*, 10 F. R. D. 153 (D. C. E. D. Pa. 1950); *Boone v. Wynn*, 10 F. R. Serv. 30b. 32, case 3, 7 F. R. D. 22, 75 Wash. L. Rep. 527 (D. C. D. C. 1947).

Non-resident defendants will probably not be required to be present within the jurisdiction to give their depositions if a hardship would result, *MacDonald v. DuMaurier*, 8 F. R. Serv. 30b. 341, case 1 (D. C. S. D. N. Y. 1945). If traveling expenses would be large, the court might order defendant to be present in the forum only on condition that plaintiff prepay these expenses, *Norton v. Cooper Jarrett, Inc.*, 1 F. R. D. 92, 94 (D. C. N. Y. N. Y. 1938) (dictum); *c.f., Hirsch v. Glidden Co.*, 11 F. R. Serv. 30a. 61, case 2, 79 F. Supp. 728 (D. C. S. D. N. Y. 1948); *Moore v. George A. Hormel & Co.*, 6 F. R. Serv. 30b. 32, case 1, 4 F. R. D. 15 (D. C. S. D. N. Y. 1942).

Officers of corporate parties should normally be examined at the corporation's principal place of business so that corporate records will be available, *Sprague Electric Co. v. Cornell-Dubilier Electric Corp.*, 8 F. R. Serv. 30b. 32, case 1, 4 F. R. D. 113 (D. C. D. Del. 1944); *Fairwater Transp. Co., Inc. v. Chris-Craft Corp.*, 4 F. R. Serv. 30b. 32, case 1, 1 F. R. D. 509 (D. C. S. D. N. Y. 1940); *Cohen v. Pennsylvania R. Co.*, 2 F. R. Serv. 30b. 32, case 1, 30 F. Supp. 419 (D. C. S. D. N. Y. 1939). This is not an invariable rule, however, *Society of Independent Motion Picture Producers v. United Detroit Theatres Corp.*, 12 F. R. Serv. 30b. 341, case 1, 8 F. R. D. 453 (D. C. E. D. Mich. 1948); c. f., *Fruit Growers Co-op. v. California Pie & Baking Co.*, 7 F .R. Serv. 26a. 31, case 1, 3 F. R. D. 206 (D. C. E. D. N. Y. 1942), and if less overall expense would result depositions of officers of non-resident corporation parties may be taken in the forum upon prepayment of the officers' traveling and hotel expenses by the party taking the deposition, *Moore v. George A. Hormel & Co.*, 6 F. R. Serv. 30b. 32, case 1, 4 F. R. D. 15 (D. C. S. D. N. Y. 1942); c.f., *Societe Internationale Pour Participations Industrielles et Commerciales S. A. v. Clark*, 12 F. R. Serv. 37d. 1, case 1, 8 F. R. D. 565 (D. C. D. C. 1948). These advances may be taxable as costs in the cause.

A corporation party will not be required to bring its non-resident employees, as contrasted to managing agents or officers, to the forum for the taking of their depositions, *Ginsberg v. Railway Express Agency, Inc.*, 8 F. R. Serv. 30b. 33, case 1, 6 F. R. D. 371 (D. C. S. D. N. Y. 1945); *Delaney v. Atlantic C. L. R. Co.*, 9 F. R. Serv. 30b. 32, case 1, 5 F. R. D. 31 (D. C. E. D. N. Y. 1945); *Fruit Growers Co-op. v. California Pie & Baking Co.*, 7 F. R. Serv. 26a. 31, case 1, 3 F. R. D. 206 (D. C. E. D. N. Y. 1942). Their depositions may be taken at any place where they act for the corporation or at their residences, but the corporation will not be required to pay the expenses of adverse party's counsel in traveling to and from the employees' location, *Delaney v. Atlantic C. L. R. Co.*, supra. If the employees are beyond the subpoena area and are willing, upon payment of their expenses, to come to the place of the forum to give their depositions, Rule 45 (d), *Farr v. Delaware, L. & W. R. Co.*, 8 F. R. Serv. 34, 35, case 1, 7 F. R. D. 494 (D. C. S. D. N. Y. 1944), the party desiring to take their oral depositions in the forum will probably have to pay the expenses involved since the corporation will not be required to produce them, *Ginsberg v. Railway Express Agency, Inc.*, supra; *Delaney v. Atlantic C. L. R. R. Co.*, supra; *Fruit Growers Co-op. v. California Pie & Baking Co.*, supra; c.f., *Moore v. George A. Hormel & Co.*, 6 F. R. Serv. 30b. 32, case 1, 4 F. R. D. 15 (D. C. S. D. N. Y. 1942).

3. *Expense of witnesses*

Witnesses within the district or subpoena area are usually paid the statutory fee and generally this amount is taxed as costs in the cause, c.f., *Gotz v. Universal Products Co.*, 7 F. R. Serv. 54d. 143, case 1, 3 F. R. D. 153, 155 (D. C. D. Del. 1943). Witnesses beyond this area may, if requested and they so choose, come to the place of the forum to give their depositions and, as in the case of employees of a corporation party, the court may in its discretion require that travel and sustenance expenses of the witnesses be advanced and provide that these advances shall be taxed as costs in the cause, *Clair v. Philadelphia Storage Battery Co.*, 1 F. R. Serv. 30b. 32, case 2, 27 F. Supp. 777 (D. C. E. D. Pa. 1939). Fees of witnesses whose depositions are taken beyond the district of the court may also be awarded as costs, *Federal Deposit Ins. Corp. v. Fruit Growers Service Co.*, 5 F. R.

Serv. 54d. 143, case 4, 2 F. R. D. 131 (D. C. E. D. Wash. 1941).

4. *Fees and expenses of attorneys*

Upon motion of adverse party, prepayment of travel expenses and fees of adverse party's counsel may be made a condition of the taking of a deposition out of the district of the forum. Several districts provide for this specifically in local rules and make the advances taxable as costs in the cause, e.g., Civil Rules of the District Court of the Southern District of New York, Rule 12; *Moore v. George A. Hormel & Co.,* 6 F. R. Serv. 30b. 41, case 1, 2 F. R. D. 340 (D. C. S. D. N. Y. 1942); *Stevens v. Minder Const. Corp.,* supra, but even in these districts the court has the discretion to require each party to bear his own expense, e.g., *Alfred Bell & Co., Ltd., v. Catalda Fine Arts, Inc.,* 9 F. R. Serv. 30a. 22, case 3, 5 F. R. D. 327 (D. C. S. D. N. Y. 1946). Irrespective of local rules, each case rests upon its own facts and will be decided in accordance with the circumstances and the equitable nature of the case, *Stierhoff v. Chesapeake & O. Ry. Co.,* 11 F. R. Serv. 30b. 41, case 1, 8 F. R. D. 54 (D. C. S. D. N. Y. 1947). But c.f., *Weeks v. Baltimore & O. R. Co.,* 9 F. R. Serv. 30b. 41, case 1, 5 F. R. D. 17 (D. C. E. D. Pa. 1945). If insolvency would prevent necessary representation at the taking of the deposition, *Gibson v. International Freighting Corp.,* 10 F. R. Serv. 30b., 41, case 1 (D. C. E. D. Pa. 1947), modified in 11 F. R. Serv. 30b. 41, case 2, 8 F. R. D. 487, 488 (D. C. E. D. Pa. 1947), or if all the desired information could be obtained through the use of interrogatories, *Moore v. George A. Hormel & Co.,* 6 F. R. Serv. 30b. 41, case 1, 2 F. R. D. 340 (D. C. S. D. N. Y. 1942); c.f., *Gibson v. International Freighting Corp.,* 12 F. R. Serv. 30b. 41, case 1, 173 F. 2d. 591 (CA 3rd 1949), cert. denied 338 U. S. 832 (1949), rehearing denied 338 U. S. 882 (1949), or if the deposition is to be used for trial only, and not for discovery and for the sole benefit of the party taking it, *Gibson v. International Freighting Corp.,* 11 F. R. Serv. 30b. 41, case 2, 8 F. R. D. 487 (D. C. E. D. Pa. 1947), affd. 173 F. 2d. 591 (CA 3rd 1949), cert. denied 338 U. S. 832 (1949), rehearing denied 338 U. S. 882 (1949), the court may require the payment of travel expenses and fees of adverse party's counsel before the deposition can be taken. However, where the party taking the deposition at a great distance from the forum cannot pay the expenses and fees of adversary's counsel he may not be prevented from taking the deposition even in those districts having a local rule providing for prepayment of expenses and fees of counsel, *Stierhoff v. Chesapeake & O. Ry. Co.,* supra.

Counsel fees are generally not required to be advanced by the non-taking party, but if a deposition is sought from a party who is abroad and who does not intend to return immediately the party may be given the choice of being present in the forum for the taking of his deposition or paying travel expenses and fees of the adverse party's counsel in traveling to and from his temporary location. If, considering all factors in the case, the court finds that justice and fairness require that one of the parties pay expenses and fees of his adversary's counsel such payment may be ordered, *Heiberg v. Hasler,* 4 F. R. Serv. 30b. 41, case 1, 1 F. R. D. 737 (D. C. E. D. N. Y. 1941); c.f., *Sullivan v. Southern Pac. Co.,* 7 F. R. D. 206 (D. C. S. D. N. Y. 1947).

5. *Expense upon failure to attend or serve subpoena.*

If a party or his attorney is present at the time and place specified in the notice, he is entitled to reimbursement for travel expenses and counsel fees if the party serving notice fails to attend; and these expenses will be awarded even though the attending party has not paid his attorney at the time of the awarding order, Rule 30 (g) (1); *Detsch & Co. v. American Products Co.,* 7 F. R. Serv. 30g. 1, case 1, 141 F. 2d. 662 (CCA 9th 1944). An award of expenses may be made if the party serving notice fails to take the deposition of one of several persons named in the notice if it is shown that his adversary went to greater expense in expectation of examination of this absent witness, *Detsch & Co. v. American Products Co.,* supra. A similar expense award may be made if the party giving notice fails to subpoena a witness and, as a result of his absence, no deposition is taken, Rule 30 (g) (2).

F. *Practical Suggestions in Taking Depositions*

1. *Discovery depositions*

Most depositions, taken for discovery, are afterwards used only for purposes of impeachment. For such use, the questions in the deposition should be so framed as to bring forth short, distinct, positive an-

swers. In the event the witness, in addition to answering a question, testifies also to unrelated facts, then the question should be repeated until the witness answers only the question asked. If this proves difficult, a series of questions should be substituted, each one as short as possible, and each one calling for a minimum of information. Such questions can then effectively be used for impeachment, unadulterated by extraneous matter.

An answer which contains an argument, or material unrelated to the question, is almost useless for impeachment purposes. The examiner should see to it that he gets answers which are not adulterated or poisoned through the interjection by the witness of statements or facts not inquired about.

The examiner should not allow the witness to evade a direct answer nor to lead the examiner off the subject. The effectiveness of the impeachment on the trial will depend almost wholly upon the accuracy with which the deposition records definite and single answers to definite and direct, usually short, questions.

2. *Protecting your witness*

Generally, depositions for discovery are taken with little formality. Many attorneys are in the habit of allowing an opponent to ask whatever questions he may desire, and then ending the deposition without asking their own witness any questions. This is done partly to save money and partly on the theory that there is no reason to give the opponent information which he has not found out for himself, considering that such discovery depositions are ordinarily used for impeachment only.

However, when taking discovery depositions under the Federal Rules of Civil Procedure, it must be constantly kept in mind that under Rule 26 (d) such depositions may be used for impeachment, may be used for any purpose when they are the testimony of a party or an officer, director, or managing agent of a corporation, or for evidence when the witness is dead, at a greater distance than 100 miles, out of the United States, unable to attend because of age, sickness, infirmity or imprisonment; or if the party offering the deposition has been unable to procure the attendance of the witness by subpoena, or if the Court decides such use is in the interest of justice.

Under this Rule, if an opponent has inquired only about such items of evidence as are in his interest, then the attorney whose witness has been examined is taking a dangerous chance if he does not proceed to ask the witness about the other side of the story.

In order to be safe, and in order to avoid the expense of many additional pages of deposition, the attorney whose witness is called might well ask his witness a few questions which will allow his witness, in a sentence or a paragraph, to tell his side of the story. For example, close the deposition with such questions as, "Now, Mr. Witness, in a few words, tell us what you saw;" or, "in a few words, tell us what you did." The witness can understand that he is then expected to tell his side of the story, briefly. Thus much expense is avoided, and in the event the deposition is used for evidence, it will not be wholly one-sided.

3. *Briefing the Deposition*

Regardless of the extra expense, have the court reporter leave a wide margin at the left. Then, before going into trial, in longhand write short or abbreviated notes on this wide margin indicating what is in the deposition at that point, such as: date, hour, place, admission of signature, contradiction, position of witness, damage items, and so forth. With a deposition properly briefed, at a moment's notice the cross examiner can put his finger upon the important previous statements of the witness. It is difficult to find a specific statement among many pages of printed matter. Material to be used in cross examination, for impeachment or otherwise, is of little value unless the examiner can find it within a few seconds. Judges do, and should, become impatient while a lawyer fingers through a stack of jumbled papers or a long deposition to find something which he should have at hand. A jury also resents such waste of time. Such briefing will pay dividends.

II. *Interrogatories and Admissions*

A. *Interrogatories to parties*

Rule 33 prescribes a method by which a party may obtain information from his opponents so as to prepare for trial, reduce the possibility of surprise at trial and narrow the factual issues so as to determine what evidence will be needed at the trial.

This right to interrogate is a substantive right, not a matter of procedure. *U. S. v.*

Certain Lands, (D. C. Fla. 1943) 53 F. Supp. 124.

The object of interrogatories is to obtain answers which may be introduced in evidence against the adverse party. *Carstens v. Great Lakes Towing Co.,* (D. C. Ohio 1945) 71 F. Supp. 394. While the utmost liberality should prevail in allowing a wide scope to the legitimate use of interrogatories, *Oktiebolaget Vargus v. Clark* (D. C. D. C. 1949) 8 F. R. D. 635, detailed and technical information is within the scope of depositions and should not be sought by interrogatories. *Batemore, Inc. v. Standard Brands,* (D. C. Mo. 1947) 7 F. R. D. 455.

The scope of interrogatories extends to all facts, ultimate or evidentiary, which are relevant and not privileged, *Chenault v. Nebraska Farm Products,* (D. C. Neb. 1949) 9 F. R. D. 529, and to any matters which can be inquired into under Rule 26 (b). *Borgen v. Pennsylvania Greyhound Lines, Inc.* (D. C. Ohio 1949) 9 F. R. D. 209. And the rule must be construed so that the evidence so obtained may be made available to all parties to the action. *National Transformer Corp. v. France Mfg. Co.,* (D. C. Ohio 1949), 9 F. R. D. 606.

1. *Service*

(a) *Time*

Interrogatories may be served after commencement of the action or after a deposition has been taken. Rule 33. A civil action is commenced by filing a complaint. Rule 3. *Robinson v. Waterman SS Co.* (D. C. N. J. 1947) 7 F. R. D. 51. The date of service is immaterial in determining the date of commencement of the action. *Gallagher v. Carroll* (D. C. N. Y. 1939, 27 F. Supp. 568.

Service of interrogatories before answer is permissible. *Fred Hart & Co. v. Recordgraph Corp.,* (D. C. Del. 1947), 7 F. R. D. 43, *McHenry v. Erie Rd. Co.,* (D. C. Ohio 1949) 9 F. R. D. 554. Interrogatories are also obtainable after a case has been placed on the pre-trial and jury calendar. *U. S. v. O'Neil Const. Co.,* (D. C. Mass. 1941) 1 F. R. D. 529.

(b) *Leave of Court*

Leave of court to serve interrogatories is required only if the interrogatories are served within ten days after the filing of the complaint. Rule 33; *McHenry v. Erie Rd. Co.* (D. C. Ohio 1949) 9 F. R. D. 554.

(c) *Manner of service*

Service should be upon the attorney of the adverse party unless service upon the party himself is ordered by the court. Rule 5.

Delivery to secure valid service may be accomplished by (1) handing to the attorney or party, (2) leaving it at the attorney's office with his clerk or other person in charge, (3) if no one in charge by leaving it in a conspicuous place in the office, or (4) if the office is closed or if the attorney has no office, by leaving it at his house or usual place of abode with some person of suitable age and discretion there residing. Rule 5.

The interrogatories may be served by mailing them to the attorney's last known address. *In re Long Island Properties,* (D. C. N. Y. 1949) 42 F. Supp. 323. But there must be strict compliance with Rule 5, if the service is to be valid. *U. S. v. Brandt* (D. C. Mont. 1948) 8 F. R. D. 163.

2. *Answers.*

(a) *Who must answer*

Interrogatories must be answered by the party served or by an officer or agent of a public or private corporation or a partnership or association. Rule 33. An "agent" is a business representative whose function is to bring about, modify, affect, accept performance of or terminate contractual obligations between his principal and third parties. *Waider v. Chicago, R. I. & P. Ry. Co.* (D. C. Iowa 1950) 10 F. R. D. 263. An engineer, fireman and crossing watchmen are not such "agents." Ibid.

An attorney for a party cannot be compelled to answer interrogatories, but must be examined by deposition under Rule 26. *Hickman v. Taylor,* 329 U. S. 495, 91 L. Ed. 451, 67 S. Ct. 385.

(b) *Time to answer*

The rule requires answers to be served by the adverse party on the party submitting the interrogatories within 15 days after service of the interrogatories, unless the court enlarges or shortens the time. However, if objections are filed, within 10 days, the answers may be deferred until the objections are determined. Rule 33. Application for additional time to answer should be supported by an affidavit showing cause. *Reitmeister v. Reitmeister,* (D. C. N. Y. 1944) 4 F. R. D. 197. The extending or

shortening the time rests in the discretion of the court. *U. S. v. A. B. Dick Co.,* (D. C. Ohio 1947) 7 F. R. D. 442.

(c) *What answers must contain*

Answers are to be direct and without evasion in accordance with the information that the interrogatee possesses. *Gaumond v. Spector Motor Service,* (D. C. Mass. 1940) 1 F. R. D. 364. A party without personal information will not be required to make admissions based on hearsay information. *Nelson v. Reid,* (D. C. Fla. 1944), 4 F. R. D. 199. But a plaintiff has been required to disclose facts in her attorney's possession even though they had not been communicated to her. *State etc. v. Baltimore & Ohio R. Co.,* (D. C. Pa. 1947) 7 F. R. D. 666. Reasonable inquiry by the interrogatee is required.

Interrogatories may not call for conclusions of law or opinions. *Bush v. Skidis,* (D. C. Mo. 1948) 8 F. R. D. 561, *Water Hammer Arrester Corp. v. Tower,* (D. C. Wis. 1947) 7 F. R. D. 620, *Picking v. Penna. Rd. Co.* (D. C. Pa. 1951) 11 F. R. D. 71. And interrogatories which require a party to make investigations, research or compile data for his opponent are improper. *Porter v. Montaldo's,* (D. C. Ohio 1946), 71 F. Supp. 372.

(d) *Use as evidence*

Answers to interrogatories are not considered evidence until offered as such at the trial and they are then subject to objection if immaterial or irrelevant. *Bowles v. Keller Glove Mfg. Co.,* (D. C. Pa. 1945) 4 F. R. D. 450, *Coca Cola Co. v. Dixi Cola Laboratories,* (D. C. Md. 1939) 30 F. Supp. 275. Answers may be used as a confession or for impeachment but may not be used by the answering party as a self-serving statement, free from the hazards of cross-examination. *Bailey v. New England Mut. Life Ins. Co.,* (D. C. Col. 1940) 1 F. R. D. 494.

Evidence which would be competent if sought by deposition, is competent if obtained by written interrogatories. *J. Schoeneman, Inc. v. Brauer,* (D. C. Mo. 1940) 1 F. R. D. 292. But as to notice and an opportunity to submit cross interrogatories see *Town of River Junction v. Maryland Casualty Co.,* (C. C. A. Fla. 1940), 110 F. 2d. 278, certiorari denied, 310 U. S. 634.

The admissibility of the answers in evidence will be determined at the time of trial and the previous order of the court requiring an answer is not necessarily determinative of its admissibility. *Brewster v. Technicolor, Inc.,* (D. C. N. Y. 1941), 2 F. R. D. 186, *Sears, Roebuck & Co. v. Harrison,* (D. C. Ill. 1940) 1 F. R. D. 135.

(e) *Failure to answer*

Upon the refusal of a party to answer an interrogatory, the proponent of the question may make an application for an order requiring an answer, upon reasonable notice to all persons affected thereby. The court, when allowing or denying such motion, may require the payment of the expenses of obtaining or resisting the order, as the case may be, by the offending party or attorney, and this may include reasonable attorney fees of the prevailing party. Rule 37 (a).

A party who declines to answer interrogatories may be precluded from offering proof at the trial. And an entry of default is warranted where the party fails to respond to interrogatories and engages in dilatory and contumacious tactics. *Michigan Window Cleaning Co. v. Martino,* (C. A. Mich. 1949) 173 F. 2d. 466. *Fisher v. Lord,* (C. C. A. Ill. 1941) 125 F. 2d. 117, *Dann v. Campagnie Generale Trans-Atlantique Ltd.,* (D. C. N. Y.1939) 29 F. Supp. 330. See also *Gipps Brewing Corp. v. Central Mfrs. Mutual Ins. Co.,* (C. C. A. Ill. 1945) 147 F. 2d. 6.

Where a defendant had not filed his answer, his failure to respond to interrogatories would result in judgment by default. *U. S. etc. v. W. E. O'Neil Construction Co.,* (D. C. Mass. 1941) 1 F. R. D. 529.

3. *Objections*

(a) *Raising of objections*

Objections must be filed within 10 days after the service of the interrogatories in the absence of an application for a protective order or extension of time. Rule 33, *Cary v. Hardy,* (D. C. Tenn. 1940) 1 F. R. D. 355, *Dann v. Campagnie Generale Trans-Atlantique, Ltd.,* (D. C. N. Y. 1939) 29 F. Supp. 330. They must be in writing, must be specific and notice of hearing thereon at an early date must be served. Only the answers to the interrogatories objected to are deferred and the others must be answered in time. *Boone v. Southern Ry. Co.,* (D. C. Pa. 1949) 9 F. R. D. 50.

(b) *Reference to master*

While references to masters under Rule 53 (b) should be the exception and not the

rule, it appears that the court has the power to refer objections to interrogatories to a master, particularly if numerous and complicated. *In re Irving-Austin Bldg. Corp.,* (C. C. A. Ill. 1939) 100 F. 2d. 574, *Tivoli Realty v. Paramount Pictures,* (D. C. Del. 1950) 10 F. R. D. 201, *Waldo Theatre Corp. v. Dandis,* (D. C. Me. 1941) 1 F. R. D. 591.

(c) *Discretion of court*

Interrogatories generally will be allowed unless the court feels justice will be impeded. *Johnson v. Queen City Coach Co.,* (D. C. Tenn. 1950) 9 F. R. D. 686. But the court is vested with a broad discretion to control the scope of interrogatories and its action will not be disturbed except in case of abuse of discretion. *DeBruce v. Penna. Rd. Co.,* (D. C. Pa. 1947) 6 F. R. D. 403, *Newall v. Phillips Petroleum Co.,* (C. C. A. Okla. 1944) 144 F. 2d. 338. And this discretion extends to the compulsory disclosure of names and witnesses. *Moorman v. Simon,* (D. C. Mo. 1947) 8 F. R. D. 471, and to the requiring of further answers, *Lowe v. Greyhound Corp.,* (D. C. Mass. 1938) 25 F. Supp. 643.

(d) *Relief available*

The burden is on the objecting party to show that his objections to the interrogatories should be sustained. *Bowles v. Safeway Stores,* (D. C. Mo. 1945) 4 F. R. D. 469. However, upon such a showing, the provisions of Rule 30 (b) are applicable for the protection of a party. Rule 33, *Stankewicz v. Pillsbury Flour Mills,* (D. C. N. Y. 1939) 26 F. Supp. 1003, *Collins v. Wayland,* (C. C. A. Ariz. 1944) 139 F. 2d. 677.

Interrogatories which in bad faith unreasonably annoy, embarrass or oppress are subject to protective orders. *U. S. v. Imperial Chemical Industries,* (D. C. N. Y. 1949) 8 F. R. D. 551. The court has wide discretion in the protection of trade secrets and other secret processes. *Ferguson v. Ford Motor Co.,* (D. C. N. Y. 1948) 8 F. R. D. 414.

A party may move to have either an interrogatory or an answer stricken. If an answer is stricken, the court may require further answer. *J. Schoeneman, Inc. v. Brauer,* (D. C. Mo. 1940) 1 F. R. D. 292.

Prejudicial error in sustaining or overruling an objection to an interrogatory may be appealed. *Neff v. Penna. Rd. Co.,* (C. C. A. Pa. 1949) 173 F. 2d. 931.

B. *Admissions of Fact and Genuineness of Documents*

Rule 36 provides a procedure for obtaining admissions of facts and admissions of the genuineness of documents so as to simplify the task of preparing a case for trial.

Rule 37 (c) provides that a party denying the truth of a requested admission must pay the cost of proving the fact or document, unless there were good reasons for such denial. A request for admissions may be useful for obtaining information as to such things as ownership, delivery, receipt of letters or goods, master-servant relationship, agency, validity or infringement of patents, hospital and doctors' records, extent of personal injuries, execution or signature of letters and legal instruments, etc. See *Hibbits v. Thompson,* (D. C. Mo. 1947) 7 F. R. D. 454.

1. *Request*

Admissions of a party are obtained by serving upon that party a written request for the admission of the truth of facts set forth in the request or documents exhibited with the request and described therein.

(a) *When Request may be made*

The request may be made "after commencement of an action." By Rule 3 an action is commenced when the complaint is filed with the court.

(a) *Leave of court*

Ordinarily, leave of court is not required. Rule 36 provides that "a party may serve upon any other party a written request," but if a plaintiff serves a request within 10 days after commencement of the action he must obtain "leave of court, granted with or without notice."

(c) *Form of request*

No particular form of request is prescribed by the rule, which provides only that it must be written, that it be for the admission "of the truth of any relevant matters of fact set forth in the request," and that copies of any documents be served with the request for their admission, unless copies have already been furnished (as when copies have been served with a pleading, motion or affidavit).

For an illustrative form of request, see Form 25, Request for Admission under Rule 36, Vol. 5, 4 Moore's Federal Practice at 2709 and 2715. Statements of facts in a

request for admission are set out in detail in the case of *Walsh v. Conn. Mut. L. Ins. Co.,* (E. D. N. Y. 1939) 26 F. Supp. 506.

The request must give at least 10 days to answer the matters therein, unless the court fixes a shorter time. If no time is stated in the request, the time may be fixed at 10 days by the court. *Hopsdal v. Loewenstein,* (D. C. Ill. 1945) 7 F. R. D. 263. However, in one case the court suppressed a request because it did not give a minimum of 10 days to answer. *Bowles v. Soverinsky,* (D. C. Mich. 1946) 65 F. Supp. 808. In another case the court permitted the request to be amended so as to state a time limit. *Morris v. W. J. Duggan Co.,* (D. C. Mass. 1942) 3 F. R. D. 39.

The request should set forth specifically and concisely the facts which are sought to be admitted.

(d) *Service*

Rule 36 requires that the request be "served" by the requesting party upon the responsive party. Prior to the 1946 amendment, copies of documents were to be "delivered" with the request. The 1946 amendment changed "delivered" to "served." Use of the term "served" requires conformance to Rule 5 (b).

In one case where the request was sent by registered mail to defendant, who had no counsel and who returned the letter marked "Refused," the request was held validly served and was deemed admitted, on motion for summary judgment. *Creedon v. Howle,* (N. D. Ohio 1948) 8 F. R. D. 92. But in another case, where counsel denied receiving the notice and there was no proof as to where the notice had been mailed, it was held there was not an effective service and the facts were not deemed admitted. *United States v. Brandt,* (D. Mont. 1948) 8 F. R. D. 163.

The requesting party must file the request with the court in compliance with Rule 5 (d) (either before service or within a reasonable time thereafter).

2. *Objections*

The responsive party may serve upon the requesting party "written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part."

Originally, Rule 36 was intended to operate without burdening the court with applications for relief from improper requests to admit. The 1946 amendment retreated from that position and authorized the making of objections.

(a) *Methods of objecting*

Any objection must be served upon the requesting party within the statutory period designated for answering the request ("not less than 10 days after service of the request, unless a longer or shorter time is allowed by the court upon motion and notice") together with a notice of hearing the objections at the earliest practicable time. "If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request." Objections may be "on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper."

The courts have had trouble with the words "otherwise improper." They have been held to sustain objections to requests which were:

(1) Too lengthy, involved or misleading. *Kraus v. General Motors Corp.,* (S. D. N. Y. 1939) 29 F. Supp. 430. See *Koppel Industrial Car & Equipment Co. v. Portalis & Co.,* 195 N. Y. S. 24, 118 Misc. 670 (S. Ct. 1922), a case under the N. Y. statute.

(2) For admission of matters of opinion. *Bowles v. Soverinsky,* (D. C. Mich. 1946) 65 F. Supp. 808, *Water Hammer Arrester Corp. v. Tower,* (D. C. Wisc. 1947), 7 F. R. D. 620, (C. C. A. 7, 1949) 171 F. 2d. 877, *Electric Furnace Co. v. Fire Assn. of Philadelphia,* (N. D. Ohio 1949) 9 F. R. D. 741.

(3) For admission of matters of law, rather than fact. *Fidelity Trust Co. v. Village of Stickney,* (C. C. A. 7. 1942) 129 F. 2d. 506. See *United States v. Lewis,* (D. N. J. 1950) 10 F. R. D. 56.

(4) Not within his knowledge and provable only by testimony of third parties. *Hanauer v. Siegel,* (N. D. Ill. 1939) 29 F. Supp. 329, *Van Horne v. Hines,* (D. C. D. C. 1940) 31 F. Supp. 346, *Booth Fisheries v. General Foods,* (D. C. Del. 1939) 27 F. Supp. 268, *Wilson v. Gas Service Co.,* (D. C. Mo. 1949) 9 F. R. D. 101.

(5) Not required to make up a party's prima facie case. *Fidelity Trust Co. v. Village of Stickney,* supra (3).

(6) Facts already known to the requesting party. (Held not a ground for objection in *Hanauer v. Siegel,* supra (4).

Electric Furnace Co. v. Fire Assn. of Philadelphia, supra (2).

In addition, upon trial, objection to the admissibility of the evidence obtained by requests for admission may be made according to the exclusionary rules of evidence. *West Kentucky Coal Co. v. Walling,* (C. C. A. 6, 1946) 171 F. 2d. 539.

3. *Answers*

(a) *Specific denial*

The responsive party may serve upon the requesting party "a sworn statement, denying specifically the matter of which an admission is requested."

(b) *Qualified denial*

Rule 36 provides that "when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder."

Thus, it is possible to make a qualified denial, but the qualification must fairly meet the substance of the request or it may be deemed admitted. In a case where the defendant requested the plaintiff to admit a release "of all indebtedness due and payable to him thereby," the reply was, "Admitted, except that it is denied that the said corporation was released of all indebtedness." This was held not specific enough and the request was deemed admitted. *Riordan v. Ferguson,* (C. C. A. 2, 1945) 147 F. 2d. 983.

Where the fact requested to be admitted cannot be admitted without a lengthy qualification, it would be safer for the responsive party to attack the request by objection.

(c) *Inability to admit or deny*

The responsive party may serve upon the requesting a sworn statement "setting forth in detail why he cannot truthfully admit or deny those matters."

A mere statement that he is "unable to admit or deny" or that he has "no knowledge" or "no competent knowledge" is insufficient, and if a party makes a denial on information and belief, rather than an absolute denial, he must give the sources thereof. *United States v. Schine Chain Theatres, Inc.,* (W. D. N. Y. 1944) 4 F. R. D. 109.

Where a request was made for admission that an attached exhibit was a correct copy of a certain doctor's examination and the response stated that nothing in the request identified the exhibit as a record of that doctor, the court held that all the answer was required to state was "whether Dr. Dunning's record of the treatment is valid. If she cannot so state, then pursuant to Rule 36 she may set forth in detail the reasons why she cannot truthfully either admit or deny the validity of this record." *Walsh v. Conn. Mut. Life Ins. Co.,* (E. D. N. Y. 1939) 26 F. Supp. 724.

(d) *Failure to answer or make objection*

Affirmative action by the responsive party is necessary if he wishes to avoid an admission implied by his silence. Unless he serves on the requesting party either a written objection or an answer (specific denial, qualified denial, or statement of inability to admit or deny) within the allowed period for answering the request, each of the matters of which an admission is requested shall be deemed admitted. *Creedon v. Howle,* (D. C. Ohio 1948) 8 F. R. D. 92, *United States v. Brandt,* (D. C. Mont. 1948) 8 F. R. D. 163. Any other course than a compliance in good faith may result in unintended admissions of fact. *Riordan v. Ferguson,* (C. C. A. 2, 1945) 147 F. 2d. 983.

The failure to respond constitutes an admission, even though the genuineness of documents had previously been denied under oath in the pleadings. *In re Independent Distillers of Kentucky,* (W. D. Ky. 1940) 34 F. Supp. 724.

However, the court may permit the party to file his answer late, if not caused by the lack of good faith and no prejudice has resulted to the other party. *Countee v. U. S.,* (C. C. A. 7, 1940), 112 F. 2d. 447, *Bowers v. E. J. Rose Mfg. Co.,* (C. C. A. 9, 1945), 145 F. 2d. 612. Contra, where a party did not ask for an enlargement of time to answer or offer to answer. *Woods v. Robb,* (C. C. A. 5, 1948), 171 F. 2d. 539.

(e) *Formal requirements*

The answer must be served upon the requesting party. See Rule 5 (b). Counsel's indorsed receipt on the original answer to the request may be sufficient to prove service. *Hopsdal v. Loewenstein,* (D. C. Del. 1945), 7 F. R. D. 263.

Although the answer must be served upon the requesting party within the allowed period of time, the answer may be

filed with the court within a reasonable time after service. Rule 5 (d). Filing the answer four days after service was within a reasonable time. *Strasser v. Fascination Candy Co.,* (N. D. Ill. 1945) 7 F. R. D. 267.

The answer must be a sworn statement of the responsive party. In a case against a Government bureau it was held that the statement might be sworn to by an Assistant U. S. Attorney for the bureau, as a person who could do so on knowledge or on information or belief. In this case, probably no one person had personal knowledge so that it was necessary for someone to question subordinate workers in order to answer the request. *Van Horne v. Hines,* (D. C. D. C. 1940) 31 F. Supp. 546. Where the verification was omitted inadvertently, a party was given an opportunity to supply the verification. *Woods v. Stewart,* (C. C. A. 5, 1948) 171 F. 2d. 544. But in another case facts were taken as admitted for lack of verification of the answer. *Beasley v. U. S.* (E. D. S. C. 1948) 81 F. Supp. 518.

The facts stated in the request must be denied specifically. An answer denying "the truth of each and every matter and statement contained in said request for admissions aforementioned and numbered from 1 to 34 both inclusive," is insufficient. *Strasser v. Fascination Candy Co.,* (N. D. Ill. 1945) 7 F. R. D. 267. It is not necessary to set out the supporting evidence or the names of witnesses in support of the sworn statement. *Van Horne v. Hines,* (D. C. D. C. 1940) 31 F. Supp. 346.

(f) *Costs and expenses*

Enforcement of Rule 36 is assured by Rule 37 (c), which provides that a party denying the truth of a requested admission must pay the cost of proving the fact or document, unless there were good reasons for the denial. For example, in a damage action where the plaintiff had requested the admission of the genuineness of a copy of the rules of the Interstate Commerce Commission (under a rule of court similar to Federal Rule 36) the Illinois Supreme Court sustained an assessment against the defendant of only $11.20 for the cost of the copy, but of $100.00 as attorney's fees for proving the copy. *Wintersteen v. National Cooperage & Woodenware Co.,* (1935) 361 Ill. 95, 197 N. E. 578. See also *Walter Hammer Arrester Corp. v. Tower,* (C. C. A. 7, 1949) 171 F. 2d. 877.

No provision is made in Rule 37 (c) for the taxing of costs and expenses, where the responsive party files an explanatory statement showing that he "cannot truthfully admit or deny these matters."

Failure to respond to a request to admit will not subject the responsive party to the payment of costs and expenses under Rule 37 (c), since the matters in the request are deemed admitted and no proof is necessary by the requesting party.

Costs will not be taxed to the responsive party where the responsive party denies a matter in the request and the requesting party attempts to prove the matter but fails to do so. *Chicago Pneumatic Tool Co. v. Ziegler,* (C. C. A. 1945) 151 F. 2d. 784.

Rule 37 (c) is qualified by Rule 37 (f), which provides that "expenses and attorney's fees are not to be imposed upon the United States."

4. *Effect of admission*

Rule 36 (b) provides that an admission made by a party pursuant to request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

A party who has made admissions has been said to be estopped from denying their truth, although this may be subject to some exceptions in some circumstances. *Int. Carbonic Eng. Co. v. Nat. Carbonic Prod. Inc.,* (S. D. Calif. 1944) 57 F. Supp. 248.

(a) *As binding on requesting party*

The requesting party is not bound by the answers, even though he offers them in evidence, and he may also offer other more favorable evidence as well. *Gordon v. American Tankers Corp.,* (1934) 286 Mass. 349, 191 N. E. 51.

One case has held that the responding party may use his own answers as evidence, based on a supposed analogy to the principle that the facts stated in a verified pleading are presumed true, until denied. *Burley Irrigation Dist. v. Ickes,* (App. D. C. 1940) 116 F. 2d 529 (see 4 Moore's Federal Practice 2726). A better rule seems to be that "unresponsive surplusage" and self-serving declarations of the responsive party are not binding on the requesting party. See *Mosby v. Texas & Pacific Ry. Co.,* (Tex. Civ. App. 1948) 191 S. W. 2d. 55, for such a holding under Texas Rule 169

(similar to Rule 36). See also *Womble v. Wiley,* (Tex. Civ. App. 1948) 209 S. W. 2d 201.

It has been held that a party need not answer a request for admissions, if he has answered interrogatories covering the same facts. *Booth Fisheries v. General Foods* (D. C. Del. 1939) 27 F. Supp. 268. However, other cases have held that a party may simultaneously take an opposing party's deposition and make a request for admissions of the same matters, *Nekrasoff v. U. S. Rubber Co.,* (D. C. N. Y. 1939) 27 F. Supp. 953, and that a party may request admissions and serve interrogatories without being forced to elect between them. *Woods v. Robb,* (C. C. A. 5, 1948) 171 F. 2d. 539, *Electric Furnace Co. v. Fire Assn. of Philadelphia,* (N. D. Ohio, 1949) 9 F. R. D. 741.

(b) *Use on motions*

A motion for summary judgment may be granted where all issues of fact are removed from the case, *Creedon v. Arielly,* (D. C. N. Y. 1948) 8 F. R. D. 265, but not if the admissions are uncertain or leave the facts in doubt. *Woods v. Robb,* (C. C. A. 5, 1948) 171 F. 2d. 539.

Admissions under Rule 36 may serve as the basis for a summary judgment. *Walsh v. Conn. Mut. Life Ins. Co.* (E. D. N. Y. 1939) 26 F. Supp. 566. In one case both parties moved for summary judgment solely on the basis of facts developed under Rule 36, and interrogatories under Rule 33. *Meikle v. Timken-Detroit Axle Co.,* (D. C. Mich. 1942) 44 F. Supp. 460.

A party claiming admissions by failure to deny must prove service of a proper request in compliance with the rule and failure to respond. Where the request was mailed to defendant's last known address, the over-sight was fatal and the failure of defendant to respond did not entitle plaintiff to summary judgment. *U. S. v. Brandt,* (D. C. Mont. 1948) 8 F. R. D. 163.

Neither the request for admission nor the sworn statement of the denial of the opposite party can be regarded as pleadings since they pertain only to the matter of proof. *Van Horne v. Hines,* (D. C. D. C. 1940) 31 F. Supp. 346.

(c) *Use on trial*

If admissions, either express or implied (through failure to deny) are to be relied on at trial, the request and answers (or a showing that no answers were made) must be put in evidence at the trial. *Gilbert v. General Motors Corp.,* (C. C. A. 2, 1943) 133 F. 2d. 997, *Kohle v. Jacobs,* (C. C. A. 5, 1944) 138 F. 2d. 440, *Woods v. Robb,* (C. C. A. 5, 1948) 171 F. 2d. 539, *Beasley v. U. S.* (E. D. S. C. 1948) 81 F. Supp. 518.

Even though an admission is made in response to a request, a party may still make an objection to its admissibility at trial upon the exclusionary rules of evidence. *West Kentucky Coal Co. v. Walling* (C. C. A. 6, 1946) 171 F. 2d. 539, *United States v. Lewis,* (D. N. J. 1950) 10 F. R. D. 56.

Admissions or denials in response to requests for admission have the same effectiveness in a case as sworn evidence. *Beasley v. U. S.* supra.

Orders made under this rule are interlocutory and not appealable. *O'Malley v.* Chrysler Corp., (C. C. A. 7, 1947) 160 F. 2d. 35.

III. *Scope of Inquiry*

A. *Relevancy to subject matter*

The scope of the examination either oral or upon written interrogatories of an adverse party or a witness is extremely broad even to the extent of eliciting testimony which would not be admissible at the trial.

Rule 26 (b) provides that the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and locations of persons having knowledge of relevant facts. The rule further says that it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

This rule has been given a broad and liberal interpretation. If the examination develops useful information, or information that might be useful, it is permissible. The examination may be not only for producing evidence to be used on trial, but also for the discovery of evidence and "leads" as to where evidence may be located. *Engl v. Aetna Life Ins. Co.,* (C. C. A. 2, 1943) 139 Fed. 2d. 469. The examination is proper on any matter, not privil-

eged, whether it relates to the plaintiff's case or the defense.

Formerly, many examinations were objected to as "Fishing Expeditions," but this examination is no longer valid. In *Hickman v. Taylor,* supra, Mr. Justice Murphy says:

> "No longer can the time honored cry of "Fishing Expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relative facts covered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."

This rule has been followed in many recent cases rejecting the objection of a "fishing expedition" where a broad examination is sought. See, for example, *Laverett v. Continental Briar Pipe Co.,* (D. C. N. Y. 1938) 25 F. Supp. 80, and *Birgstrom Paper Co. v. Continental Ins. Co.,* (D. C. Wis. 1947) 7 F. R. D. 548.

The test is relevancy in the broad view and the scope is not limited unless the testimony is privileged or clearly irrelevant. Matters which concern credibility, facts to impeach a witness, or cross-examination are allowed.

B. *Examination in adverse party's case*

The examination of an adverse party is usually primarily on the facts of the occurrence. Such an examination may include not only the manner in which the occurrence happened, but also all the surrounding circumstances and conditions.

Also, the examining party may make his inquiry broad enough to include the identity of witnesses, although a party may not be required to disclose which of the witnesses he intends to use at trial. *McNamara v. Erschen,* (D. C. Del. 1948) 8 F. R. D. 427, *In re Citizens Casualty Co. of New York,* (D. C. N. Y. 1942) 3 F. R. D. 171, *Frankson v. Carter & Weeks Stevedoring Co.,* (D. C. N. Y. 1949) 9 F. R. D. 32.

If the examiner seeks a discovery and inspection of documents or other material things, his notice to produce must be directed to the person who has possession of those documents or things and the notice must describe the documents or things sought to be inspected. *Michel v. Maier,* (D. C. Pa. 1945) 8 F. R. D. 464, *Sonken Galamba Corp. v. Atchison T. & S. F. Railway Co.,* (D. C. Mo. 1939) 30 F. Supp. 936, *Gordon v. Penn. R. R. Co.,* (D. C. Pa. 1946) 5 F. R. D. 510.

As part of the interrogation, the examining party may seek information as to the existence and custody of documents or other material things and, on the basis of the answers, may then seek production of them. *Margo v. Moore-McCormack Lines,* (D. C. N. Y. 1945) 7 F. R. D. 378, *Stewart-Warner Corp. v. Staley,* (D. C. Pa. 1945) 4 F. R. D. 333.

This is in line with the principle stated above that the interrogator may ask questions which are calculated to lead to the discovery of additional evidence.

The principal purpose of deposition and discovery procedure under the federal rules is to allow each party to come to the trial with a complete knowledge of all of the facts of the case. But another and important function of the deposition procedure is to enable a party to procure a record of the testimony of any party or witness before the trial, which record may be used at trial to limit the scope of the testimony which that party or witness may give. So, the interrogator may ask questions without regard to whether or not he already has answers to those questions or has knowledge of the facts about which he interrogates. *Kingsway Press v. Farrell Publ. Corp.,* (D. C. N. Y. 1939) 30 F. Supp. 755, *O'Donnell v. Breuninger,* (D. C. D. C. 1949) 9 F. R. D. 245.

C. *Discovery*

1. *Evidence to support case of examining party*

(a) *Names of witnesses*

A party is entitled to the names of witnesses known to the adverse party, though the granting of such right may be discretionary with the court. It is permissible to inquire into identity and location of persons having knowledge of relevant facts for purpose of discovery. Rule 26 (b), *Aktiebolaget Vargos v. Clark,* (D. C. D. C. 1949) 8 F. R. D. 635.

A stevedoring company was required to disclose, in response to a motion by a plaintiff crew member injured in a fall, the names and addresses of any persons in its employ or known to company, who were witnesses to the accident. *Frankson v. Carter & Welks Stevedoring Co.,* (D. C. N. Y. 32) 9 F. R. D. 32.

A party is entitled to information of relevant facts within the knowledge of his ad-

versary and of names of persons who have knowledge of such facts but is not entitled to the names of witnesses by whom facts will be subsequently proven. *General Motors Corp. v. California Research Corp.*, (D. C. Del. 1948) 8 F. R. D. 568.

Plaintiff is entitled to the names of persons from whom statements were obtained by defendant, names of persons taking such statements, the dates thereof and whether the statements contained facts concerning plaintiff's accident and injury, but plaintiff is not entitled to copies of such statements nor written summaries of oral statements. *Jones v. Pennsylvania R. Co.*, (D. C. Ill. 1947) 7 F. R. D. 662.

But a District Court in Missouri has held that whether a party should disclose the names of his witnesses in answer to an interrogatory is discretionary with the Court. *Moorman v. Simon*, (D. C. Mo. 1947) 8 F. R. D. 328.

(b) *Statements of witnesses*

The weight of authority grants the right of one party to inspect statements held by the adverse party where good cause is shown. This does not give a party an absolute right to obtain either the text or resume of the statements which the adverse party has obtained from the persons he or his agents have seen. To obtain such statements a party must proceed under Rule 34 and show good cause for their production. In other words, he must show that there are special circumstances in his particular case which make the production essential to the preparation of his case. *Alltmont, et al. v. United States*, (C. A. 3, 1949) 177 F. 2d. 971.

The court may order signed statements, or those written by witnesses, produced for inspection, copying or photographing by an adverse party upon a showing of good cause therefor, such as impossibility or difficulty of access to the witness or his refusal to respond to requests for information and the need for such statements for impeachment purposes. *Morrone v. Southern Pacific Co.* (D. C. Calif. 1947) 7 F. R. D. 214.

In an action against a railroad for injuries to a passenger, any statement which a party, officer, agent or employee was required to make concerning the accident was available to the opposite party for inspection, including any statement which the defendant or its representative may have obtained from the plaintiff, but a litigant should not have access to records and information therein secured by the party to be examined after considerable effort and expense incident to preparation for trial. *Kirshner v. Palmer*, (D. C. N. Y. 1945) 7 F. R. D. 252.

Where a defendant denied any knowledge of an accident giving rise to litigation and his attorneys were unable to investigate the accident properly, and attorneys for plaintiff, who had previously filed an action against a third party, had made a thorough investigation, defendant was entitled to an order for the production for defendant to examine and copy all statements of witnesses, not privileged, which contained evidence or matters relating to such action, or accident giving rise thereto, and to all papers, records, reports, letters, notes and memoranda, not privileged, which disclosed oral statements made by witnesses to such accident. *Lindsay v. Prince*, (D. C. Ohio 1948) 8 F. R. D. 233.

Memoranda, statements, or reports gathered or made by counsel after a claim has arisen are not protected from discovery on basis that they are privileged. *State of Maryland, to Use of Peters v. Baltimore & O. R. Co.*, (D. C. Pa. 1947) 7 F. R. D. 666. And it has been said that the broad policy against invasion of an attorney's privacy and freedom in preparation of a case does not make memoranda, statements, or reports gathered or made by the attorney, while acting for his client, absolutely immune from discovery.

Generally a plaintiff is entitled to a discovery of the facts upon which a defendant bases its defense, and in addition in conjunction with permissible interrogatories, is entitled, without showing good cause, to copies of statements of witnesses, if they were not obtained by defendant's counsel. *Hen-Ray Food Markets v. Great Am. Indem. Co.*, (D. C. Pa. 1949) 8 F. R. D. 549.

But note the holding that the production of statements of witnesses to an accident, obtained by defendant or its attorney by independent investigations and preparation for trial, cannot be compelled, since it is unreasonable to permit one party to obtain by discovery the results of the preparation for trial of the other party. *Mulligan v. Eastern S. S. Lines*, (D. C. N. Y. 1946) 6 F. R. D. 601.

(c) *Documents, photographs, etc.*

Upon the showing of good cause and relevancy a party is entitled to compel the

other party to produce documents and photographs for inspection. This procedure is under Rule 34.

Rules 33 and 34 show a clear distinction between obtaining answers to interrogatories (33) and compelling the production of documents either for inspection or copying (34). Answers to interrogatories may be compelled as of right if relating to relevant, unprivileged matters. For production of documents one must show just cause. *Alltmont, et al. v. United States,* (C. A. 3, 1949) 177 F. 2d. 971.

Under Rule 34, upon showing good cause, any party is entitled upon notice to the production for the purpose of inspection and copying or photographing of designated documents and records of the other party. *Champion Spark Plug Co. v. Reich,* (D. C. Mo. 1947) 7 F. R. D. 587, and this rule will be liberally interpreted. *United States v. U. S. Alkali Export Assn.,* (D. C. N. Y. 1946) 7 F. R. D. 256. *Hirshhorn v. Mine Safety Appliances Co.,* (D. C. Pa. 1948) 8 F. R. D. 11. This rule is devised to secure additional documents needed after their relevancy and disclosure have been made by proceeding under the rule regarding depositions. *Canuso v. City of Niagara Falls,* (D. C. N. Y. 1945) 7 F. R. D. 162. It is to be used to call for production of documents already in existence and in the possession or control of an adverse party and not to require an adverse party to prepare a written list to be produced for inspection. *United States v. U. S. Alkali Export Assn.,* supra.

The courts say that mutual knowledge of all the relevant facts gathered by either party is essential to proper litigation and to that end either party may compel the other to produce documents and things for inspection, copying or photographing. *Hirshhorn v. Mine Safety Appliances Co.,* supra.

"Good cause" as a condition to discovery and production of documents means some plainly adequate reason for the desired production and inspection. *Marzo v. Moore-McCormack Lines,* (D. C. N. Y. 1945) 7 F. R. D. 378. The party moving for an order compelling another party to produce documents for inspection and copying must show good cause, the documents must not be privileged, and they must be "relevant," by which is meant that they must contain material evidence. *Wild v. Payson,* (D. C. N. Y. 1946) 7 F. R. D. 495. Discovery and production of records should be permitted either party where reference to the records, etc. might aid or assist in the examination of any witness called or make possible the full and complete preparation of the case of plaintiff or defendants for trial. *Michel v. Meier,* (D. C. Pa. 1948) 8 F. R. D. 464.

A plaintiff was held to be entitled to discovery of plans and photographs of the locality of an accident prepared for the defendant, but inspection of them under Federal Rule 34 was the logical method, rather than a requirement that defendant prepare copies of them. *Potter Title & Trust Co. v. Pennsylvania R. Co.,* (D. C. Pa. 1946) 6 F. R. D. 609. In another case the plaintiff was permitted to examine and copy or photograph any photographs, maps and diagrams defendants had of the accident scene where the plaintiff was unable to obtain such evidence because she was seriously injured. *Cogdill v. Tennessee Valley Authority,* (D. C. Tenn. 1947) 7 F. R. D. 411. This right to inspect, copy and use such records and material was not an absolute right but was one which could be exercised only under definitely restricted circumstances, subject to such limitations as the court might direct for the protection of the parties. *Michel v. Meier,* supra, *Hirshhorn v. Mine Safety Appliances Co.,* supra.

(d) *Opinions*

The production of "advice and opinions" of counsel cannot be compelled as a "discovery of facts." *In re Prudence Bonds Corp.,* (D. C. N. Y. 1948) 76 F. Supp. 643. Discovery should be confined to bare facts and not to any elaboration of explanation or comparison. *Hercules Powder Co. v. Rohm & Haas Co.,* (D. C. Del. 1944) 3 F. R. D. 328.

Contentions, opinions and legal conclusions may not be required by interrogatories. *United States v. Columbia Steel Co.,* (D. C. Del. 1947) 7 F. R. D. 183, and the rules do not require a party to answer interrogatories requiring expressions of opinion. *General Motors Corp. v. California Research Corp.,* (D. C. Del. 1948) 8 F. R. D. 568.

Interrogatories requiring an expession of opinion or calling for conclusions are objectionable and ordinarily should not be permitted. *Porter v. Montaldo's,* (D. C. Ohio 1946) 71 F. Supp. 372. A party interrogated need only answer matters of fact within his knowledge and is not required to express opinions nor to make research

and compilation of data and information not readily known to him. *Walling v. Parry,* (D. C. Pa. 1947) 6 F. R. D. 554.

D. *Privileged Matters*

(a) *Attorney and Client*

Information which an attorney has obtained from his client is confidential, hence privileged. *Rowe v. Union Central Life Ins. Co.* 1 F. R. Serv. 26 (b) 41, (D. C. D. C. 1939). The written statements of witnesses, private memoranda of conferences with witnesses and personal recollections prepared by an adverse party's counsel in the course of his legal duties are not privileged but, at the same time, are not subject to discovery in the absence of a showing of necessity or justification. While discovery may be had of written statements and documents in an attorney's file if they contain relevant and nonprivileged facts, the burden is on the party seeking discovery to establish adequate reasons to justify production. Discovery is in the discretion of the district court, if such a showing is made. Only in a rare case, if ever, will an attorney be required to write down or state his recollection of oral conferences with witnesses. *Hickman v. Taylor,* supra.

An attorney's memoranda of his talks with witnesses, signed statements made by witnesses to him, and the lawyer's recollection of talks with witnesses have been held to be privileged against discovery by the adverse party. Such matters, while not coming within the traditional scope of the attorney-client privilege, since not communicated by the client to the attorney, should nevertheless be privileged for the same considerations of policy that underlie the original privilege. The scope of examination under rules 33 and 34 is subject to the same limitation of privilege. *Hickman v. Taylor,* supra.

In *Alltmont v. U. S.,* 177 F. 2d. 971, 978, (C. A. 3d. 1949), the court went to great length to explain the application of the rule laid down in *Hickman v. Taylor,* supra, in the application of Federal Rules 33 and 34, and stated:

"As we understand Civil Procedure Rule 33 . . . a party is entitled as of right to compel his adversary to make a full disclosure of all of the facts which the latter has learned which are relevant to the subject matter of the pending action and unprivileged, including information as to relevant statements and other documents in his control and the names and addresses of all persons having knowledge of relevant facts whom he or his agents have interviewed. The Rules, however, do not give a party an absolute right to obtain either the text or a resume of the statements which the adverse party has obtained from the persons whom he or his agents have seen. Having obtained information as to the existence, nature and location of the statements through interrogatories he is in position to move for their production under Civil Procedure Rule 34. . . . But he must in every case make the showing of good cause required by those rules for their production. In other words, he must show that these are special circumstances in his particular case which make it essential to the preparation of his case in the interest of justice that the statements be produced for his inspection or copying."

Therefore, the examiner will:

1. Proceed under Rule 31 to obtain the necessary information, if it is not privileged;

2. Then proceed under Rule 34, upon a showing of good cause, to obtain a resume or text of statements which an adverse party has obtained from persons he or his agents have seen. Care should be exercised to guard against an inadvertent waiver of the privilege. In *Smith v. Bentley,* 13 F. R. Serv. 26b 41, 9 F. R. D. 489 (D. C. S. D. N. Y. 1949) it was held that where defendant in its answer had alleged that certain payments were made to another defendant on advice of counsel, said defendant thereby waived any attorney-client privilege as to such matter and could not object to inquiry as to such advice on the basis of privilege.

Nor does the relationship of attorney-client extend so far under Rule 26 (b) so that a party on an examination before trial may refuse to disclose information because it was acquired by him from investigations made by his attorney. Such information is not privileged and, if relevant, the other party is entitled to it. *O'Donnell v. Breuninger,* 13 F. R. Serv. 26b. 211, 77 Wash. L. Rep. 1202 (D. C. D. C. 1949).

The rules do not contemplate that a lawyer, as an attorney in a case, can be called upon to give testimony against his client by requiring him to produce writ-

ten statements, private memoranda and personal recollections prepared by him as counsel in the course of his legal duties. *Brush v. Harkins,* 9 F. R. D. 681. (D. C. D. C. 1950) Rules 26, 30 and 45.

(b) *Agent of attorney*

Generally, an agent hired by an attorney in connection with expected litigation may not be compelled to divulge the results of his work or give any information concerning it. It is not clear whether such rule is an extension of the attorney-client relationship or whether it is based upon public policy and various theories have been advanced to substantiate the above position. 8 Wigmore on Evidence (3rd Ed.) sec. 2301, explains the existence of such rule on the ground of necessity.

> "The assistance of the agents being indispensable to his work, and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agent."

In *Lewis v. United Air Lines Transport Corp.* 32 F. Supp. 21, 23 (W. D. Pa. 1940), a third party defendant sought to take the deposition of an expert witness, who had been employed by counsel for the defendant. The witness refused to answer on the ground of privilege. The court held that the witness should not be compelled to answer and said:

> "to permit a party by deposition to examine an expert of the opposite party before trial, to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without making any compensation therefor. To permit parties to examine the expert witness of the other party in land condemnation and patent actions, where the evidence nearly all comes from expert witnesses, would cause confusion and probably would violate that provision of Rule 2 which provides that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'"

See also, *Cold Metal Process Co. v. Aluminum Co.,* 7 F. R. D. 684, (D. C. Mass. 1947).

However, in *Bergstrom Paper Co. v. Continental Ins. Co. of City of New York,* 7 F. R. D. 548 (D. C. Wisc. 1947), it was held that an expert witness engaged by a party to investigate the cause of an explosion which was the subject of litigation might be examined, by deposition, as to his investigation and findings, including his conclusions as to the cause and situs of the explosion. This holding was predicated upon the theory that the discovery procedure simply advances the stage at which disclosure can be compelled. In this case, however, various reports and other documents had been produced by stipulation at the examination.

Finally, an interrogatory is not objectionable because it calls for an expert opinion, especially where the expert is an engineer in the regular employ of the adverse party. *Kendall v. United Air Lines, Inc.,* 13 F. R. Serv. 33, 342, 9 F. R. D. 702 (D. C. S. D. N. Y. 1949).

(c) *Employee of client*

The moving party for the production of documents under Rule 34 must show good cause therefor. *Alltmont v. United States,* supra; *Reeves v. Pennsylvania R. Co.,* 8 F. R. D. 616 (D. C. Del. 1948). If the reports and statements of employees of the client are made more or less contemporaneously with the happening of the incident, contain information not reasonably obtainable elsewhere after the institution of the suit, and are necessary to the preparation of the adverse party's case, then they are not privileged. 2 Moore's Federal Practice (1st Ed.) p. 2640.

In *Pennsylvania R. Co. v. Julian,* 10 F. R. D. 452 (D. C. Del. 1950), it was held that in an action for damages to the plaintiff's train, statements and reports of railroad employees, reports of railroad claim agents, medical reports prepared and filed with railroad employees in the train accident and photographs of an engine taken after the accident were prepared as a routine matter and were not for use in an existing or intended action and were, therefore, not privileged.

Again, in an action for the death of a child struck by the defendant's bus, the motion by the plaintiff to compel the defendant to produce for inspection and copying the written report made by the bus driver concerning the accident was not a request for privileged documents. *Dulansky v. Iowa-Illinois Gas & Elec. Co.,* 10 F. R. D. 146 (D. C. S. D. Iowa 1950).

Therefore, where statements of a liti-

gant's employees are made in the regular course of business and not solely to aid trial, these statements may be inspected. *Portman v. Amer. Home Products Corp.*, 9 F. R. D. 613 (D. C. S. D. N. Y. 1949); *Smith v. Washington Gas Light Co.*, 7 F. R. D. 735 (D. C. D. C. 1948); *Rockett v. John J. Casale, Inc.*, 7 F. R. D. 575 (D. C. S. D. N. Y. 1947); *Corbett v. Columbia Transportation Co.*, 5 F. R. D. 217 (D. C. W. D. N. Y. 1946).

(d) *Insurer-insured*

The fact that certain information is in the hands of defendant's insurer or its attorney does not make it privileged, and the plaintiff may take the deposition of defendant's insurer on any matters not privileged. *Seligson v. Camp Westover, Inc.*, 1 F. R. D. 733 (D. C. S. D. N. Y. 1941). Also the reports, statements and affidavits taken by an insurer before submission of the matter to its attorney may be examined on taking the deposition of an employee or agent of the insurer. *Matthies v. Peter Connolly Co.*, 2 F. R. D. 277 (D. C. E. D. N. Y. 1941).

In *Colpak v. Hetterick*, 40 F. Supp. 350 (E. D. N. Y. 1941), it was held that an investigation made by an insurance company and not by its attorney for the purpose of preparing for trial is not privileged. Any written statements of the defendants, or of doctors, in the possession of the insurance company should be exhibited to the attorney for the plaintiff and copies thereof given to him, and the insurance company's chief claims agent could be examined as to any oral statements made to him personally by any defendant, since such written and oral statements could contain admissions against interest and would be of value in testing the truth of testimony offered at the trial.

Also, the statements of plaintiff and his witnesses obtained by defendant's insurer in an automobile accident were held not privileged and might not be made so by turning them over to the defendant's attorney. *Price v. Levitt*, 29 F. Supp. 164, (E. D. N. Y. 1939).

(e) *Processes—trade secrets*

Under Rule 30 (b), orders for the protection of parties and deponents at the taking of depositions and in answering interrogatories may be entered. To invoke the protection afforded by this rule, it is necessary to show "good cause." Practical and substantial reasons must be advanced showing why the answers to interrogatories should be limited. The gist of "good cause" as used in Rule 30 (b) is a factual matter to be determined from the nature and character of the information sought. *Glick v. McKesson & Robbins, Inc.*, 14 Fed. Rules Serv. 30b, 352 (D. C. W. D. Mo. 1950).

Trade secrets or processes come within the general purview of the rule. But in *Lenerts v. Rapidol Distributing Co.*, 3 F. R. D. 42 (D. C. S. D. N. Y. 1942), it was held that although it is improper to require a party to disclose a secret formula or trade secret, he may be required to disclose the ingredients that make up the formula. Furthermore, the objection that the taking of depositions would disclose "trade secrets" has been met very nicely in one instance by ordering protective safeguards against their improper disclosure. In *Cooney v. Guild Co.*, 1 F. R. D. 246 (D. C. S. D. N. Y. 1940), objection to the production of documents at the taking of a deposition on the ground that it might result in a disclosure of information to a competitor was overcome by an agreement that the order directing production of the documents shall contain provisions to insure the non-disclosure of such information to improper parties.

(f) *Other relationships*

1. *Privilege existing under foreign law*

A witness cannot refuse to answer a question on the taking of his deposition on the ground of a privilege given under a foreign law. *Societe Internationale Pour Participation Industrielles et Commerciales S. A. v. McGrath*, 9 F. R. D. 680 (D. C. D. C. 1950).

2. *Physician-patient*

The statutory privilege as to information acquired by a physician in attending a patient attaches only to such information and does not disqualify the physician as a witness, and his deposition may be taken when there is no showing that the only information which the examining party seeks to elicit would be privileged. *Feldmann v. Conn. Mut. Life Ins. Co.*, 57 F. Supp. 70 (E. D. Mo. 1944).

E. *Access to Files of Adverse Party*

As has been shown, adverse counsel may obtain copies of statements from counsel's files, but only by showing good cause.

Hickman v. Taylor, supra. Such statements cannot be obtained by interrogatories without a showing of good cause. *Alltmont v. U. S.* supra. Upon a showing of good cause, defendant may obtain copies of statements taken by plaintiff's counsel. *Lindsay v. Prince,* (D. C. Ohio 1948), 8 F. R. D. 233.

Interrogatories addressed to a plaintiff requiring him to state the names and addresses of witnesses that plaintiff would call at the trial were held improper. *McNamara v. Erschen,* (D. C. Del. 1948), 8 F. R. D. 427. And a plaintiff may not require a defendant to produce a copy of a statement given by him to defendant's attorney in the absence of good cause therefor. *Safeway Stores v. Reynolds,* (C. A. D. C. 1949), 176 F. 2d. 476.

The question of whether information sought by interrogatory or discovery is privileged must be determined by the applicable state law where the cause of action arises, and, if privileged under that state law, its production cannot be compelled. *Reeves v. Pennsylvania Railroad Company,* (D. C. Del. 1949) 8 F. R. D. 616. See also, 62 Harvard Law Review, page 269.

The trend of the decisions seems to be, first, to require a showing of good cause for any access to adverse counsel's file, and, second, to resolve the question of privilege in favor of privilege rather than against it. When factual matter is sought, it may generally be obtained. When counsel's opinion is sought, it may not be obtained.

IV. *Physical and Mental Examination*

1. *When and How*

(a) *Who may be examined*

Under Rule 35 a party to an action whose mental or physical condition is in controversy may be examined, provided good cause is shown. *Sibbach v. Wilson & Co.,* 312 U. S. 1, 85 L. Ed. 479, 61 S. Ct. 422. In an early case which was a libel action against a physician who published an article stating that the plaintiff was suffering from various physical and mental conditions, the court denied the motion for an examination on the grounds that (1) historically the right had been limited to personal injury cases and (2) the rule was meant to apply where physical and mental conditions of the party were, "Immediately and directly," in controversy. *Wadlow v. Humberd,* 27 F. Supp. 210, (D. C. Mo. 1939).

Various text writers have taken issue with this view on the ground that it was too strict an interpretation, because in this type of libel action the physical condition was the ultimate issue in controversy. 4 Moore Fed. Prac. 2nd Ed. Para. 35. 03. In a later case, a more liberal view was taken of the rule and it was stated that such strict interpretation was erroneous. *Beach v. Beach,* 114 F. 2d. 479 (C. A. D. C. 1940).

In this case, the court permitted an examination to determine the blood type of a child whose paternity was in question. This was a much broader conception of the rule than originally given and permitted the application of a procedure that might help determine the truth in this difficult type of case.

(b) *Motion and notice*

The rule provides that the order may be made only on motion for good cause shown and upon notice to the party to be examined, and to all other parties, and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is made.

(c) *Order*

An order requiring a party to submit to a physical or mental examination may issue, "in a case in which the mental and physical condition of a party is in controversy." Physical examinations have been frequently used in personal injury cases and nothing in the wording of the rule limits the physical or mental condition to a condition, "immediately and directly," in controversy. Nor is there any expressed limitation on the type of action in which it may be used.

It should be noted that the rule requires that an order for physical or mental examination may be made for "good cause shown." In most cases it will be easy to make such a showing where the mental or physical condition of the party is actually in controversy. For example, a showing that the defendant has good reason to believe that the injuries of which the plaintiff complains are not as serious as he contends, has been held to be sufficient. *Leach v. Grief,* (S. D. Miss. 1942), 6 F. R. Serv. 34. 411.

If the examination is painful or dangerous, the court will require a clear showing that no danger or serious pain is likely to result. *Strasser v. Prud. Life,* 1 F. R. Serv. 35a. 42. It seems to be settled that

x-ray examination and blood type tests are proper. *Beach v. Beach,* supra.

A party seeking a physical examination cannot demand a doctor of his own choice. If the parties cannot agree, the court shall select a competent physician and may prescribe who can be present at the examination. 4 Moore Fed. Prac. 2nd Ed., Para. 35. 04.

(d) *Discretion of court*

Rule 35 vests a wide discretion in the court as to whether or not to require an examination, the type of examination which may be ordered and the terms and conditions which may be imposed.

An order for a physical examination is interlocutory and not appealable. *Bowles v. Commercial Casualty,* 107 F. 2d 169 (C. A. 4, 1939).

2. *Exchange of reports*

(a) *When written*

The rule provides that the examined party upon request may obtain a copy of the physician's report with respect to the examination and that if the examined party requests and receives such copy, the party requesting the examination is entitled, upon request, to receive from the party examined a like report of any examination previously or thereafter made of the same mental or physical condition. This right is not waived by submitting to the examination voluntarily rather than insisting upon a court order. *Lipshitz v. Bleyhl,* (D. C. N. Y. 1946), 9 F. R. Serv. 35b. 11, Case 1, *Rutherford v. Alben,* (D. C. W. Va. 1940), 3 F. R. Serv. 35b. 11, Case 1, *Kelleher v. Cohoes Trucking Co.,* (D. C. N. Y. 1938) 25 F. Supp. 965. This right does not apply to hospital records or other office records of the physician's. *Butts v. Sears and Roebuck,* 12 F. R. Serv. 35b. 22.

(b) *When oral only*

The court has the inherent power to compel the examining physician to make a written report setting out his findings and conclusions and also to require the person causing the examination to be made to comply with the request of the examined party that he be furnished a copy of the examiner's report. Moore's Fed. Prac. 2nd Ed., Vol. 4, Section 35.06.

(c) *Failure or refusal to deliver reports*

If a party refuses to obey an order under this rule, the court may prohibit him from introducing evidence concerning the physical or mental condition. However, the court is not authorized to make an order directing the arrest of a party who disobeys the order nor can the court punish for refusal to obey, at least where imprisonment is involved. *Sibbach v. Wilson and Co.,* supra.

3. *Repeated examinations*

The rule calls for a physical or mental examination, and it is within the discretion of the court whether to order repeated examinations. Good cause therefor could be that the physical or mental condition of the party had changed since the day of the original examination.

4. *Privilege*

The majority of the court in the Sibbach case concluded that the matter of a physical or mental examination of a party is procedural in character, that Congress can deal with this matter by statute or delegate to the court the power to deal with it by rule, and that Congress did, and this was not a violation of the Enabling Act. There is a strong dissent by Mr. Justice Frankfurter, in which he says that this is "a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy." Let it also be noted that under Rule 35b (2), if the party examined requests and obtains a report of the examination or takes the deposition of the examiner, he thereby waives any privilege he may have in that action or any other involving the same controversy, as to the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

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OPEN FORUM

24th Annual Meeting of International Association of Insurance Counsel

Fire and Inland Marine Insurance Committee

Chairman: AMBROSE B. KELLY
Providence, Rhode Island

Subject: LIABILITY AND INSURANCE FOR ATOMIC ENERGY OPERATIONS

MR. L. DENMAN MOODY (Houston, Texas): Gentlemen, we are running behind time and my remarks will be very brief indeed. We turn now from the question of pre-trial to that of Atomic Energy. The more I thik about the various ramifica tions of Atomic Energy, the more fields I find it opens up to the trial lawyer. Our Moderator today is Mr. Ambrose Kelly. He is a man well qualified to speak on this subject. He has had considerable training on it. This part of the Open Forum is put on by the Fire and Inland Marine Insurance Committee, and without taking up any further time in view of the fact that we are very late, I will introduce Mr. Ambrose Kelly and let him take charge for you. Mr. Kelly. (Applause)

MODERATOR AMBROSE B. KELLY (Providence, Rhode Island): I knew of course that most of you had a predominant interest in pre-trial. I want to congratulate those few faithful who have stayed with us to the end. We have with us as the subject of the day the question of Atomic Energy and Insurance, and all of you realize that it was given quite exhaustive discussion at our meeting last year.

Mr. Duncan Lloyd, President last year, felt that that was one of the great issues which would face insurance companies and their trial lawyers in the years ahead, and we therefore in our various committees and on our program gave it the benefit of extended study and discussion. Last year of course you had the benefit of hearing about Beta Rays and Gamma Radiations, and I am sure that some of the technical parts of the discussion were perhaps outside of the ordinary experience of the trial lawyer.

This year we are trying to come to grips with the subject on a much more practical level. We are trying to consider right now today the implications and the reaction between the whole Atomic Energy program and the insurance coverage which is made available to the people of the Untied States under present contracts. So that there will be no misunderstanding, we expect to give the major part of our consideration to the peacetime developments of atomic energy and the questions which it is going to raise from an insurance standpoint in the years ahead. Before we finish the discussion we will of course spend a few moments in a review of the present situation as far as the use of an atomic bomb by a hostile or enemy power is concerned and its effect upon existing insurance contracts in both the fire and casualty fields.

In our discussion, as I say, we are trying to bring the whole issue down to what you are going to face, not fifty years from now, not ten years from now, but substantially today and tomorrow, and we have gathered together a group of men who, I think, are very well qualified to discuss this subect with you; and I hope that in our discussion we will have the necessary interplay between members of the panel and members of the audience so that the questions you have in your minds will be brought out. The discussion will, I think, be occasionally somewhat informal.

May I introduce the members of the panel and ask them to join me here in my splendid isolation upon the platform so that we can proceed promptly to place this problem before you.

We have as one of our speakers—and I should say almost our headline speaker—Everett Hollis, the General Counsel of the Atomic Energy Commission. (Applause)

We have, as a substitute for Russell Matthias, Jimmy Fellers of Oklahoma City who, as chairman of the subcommittee, has been

studying some of the aspects of this question in the last year for the Fire and Inland Marine Insurance Committee.

And last, but by no means least, Jack Faude. He will discuss some of the insurance implications of the problem.

As I said, we are trying to come right down to cases in this. We have the overall question of the interaction between atomic energy operations and insurance, and we have a few basic questions which we may not find answers to but which we would like to discuss with you. One of those questions, of course, is: Is it the responsibility of the Federal government for damages to property or injury to persons as a result of the Atomic Energy program? Secondly, of course we have the question of what insurance coverage is provided under our present contracts in the fire, casualty, and life fields against damage or inury which can be attributed to the development of atomic energy, nuclear fission, or other aspects of the program.

To start off the discussion I would like to ask Mr. Hollis to make a preliminary statement with reference to Atomic Energy and Insurance as it is seen from the standpoint of the Atomic Energy Commission. Mr. Hollis. (Applause)

"Atomic Energy and Insurance Industry"

HONORABLE EVERETT L. HOLLIS
General Counsel, United States Atomic Energy Commission
Washington, D. C.

WHEN Gordon Dean, Chairman of the Atomic Energy Commission asked me to be present at this discussion I told him that I did not have any special competence in the field of insurance law and that I certainly had no ready answers for some of the vexing legal problems that you would want to discuss. I did, however, feel that I could make a contribution to your discussions by describing something of the nature of the atomic energy project and of our contractual arrangements, including our insurance contracts, hoping that this would lend to your discussion some further perspective on the atomic energy industry.

The atomic energy project is an enormous enterprise. On the production side it begins with the exploration and mining for ores, principally uranium, which go through complicated stages of processing and refinement, and ends with the production of uranium-235 in the separation plants at Oak Ridge, Tennessee and the production of plutonium in reactors at Hanford, Washington. Extensive new production facilities are being added at Savannah River, S. C.; Puducah, Kentucky; and elsewhere. On the weapons side the project includes the fabrication of U-235 and plutonium into a form suitable for use in weapons and the fabrication and assembly of non-fissionable elements of atomic weapons. Most of the weapons program centers around the work of the Los Alamos Laboratory in New Mexico. In the areas of research and development there are a number of Government-owned laboratories, the largest of which are located at Brookhaven, Long Island; Oak Ridge, Tennessee; Chicago, Illinois; Los Alamos, New Mexico; Ames, Iowa and Berkeley, California. In addition there are a number of developmental projects leading towards improved methods of production of fissionable material and new uses of this material in reactors for a variety of purposes, including the production of useable power for the propulsion of submarines and aircraft and for the generation of electricity. Some of these new developmental projects are actually under construction at our Reactor Testing Station in Idaho. Others are still in the research or planning stage.

The total plant and equipment investment in the atomic energy project stands close to two and one-half billion dollars as of the end of this month. This figure will be approximately doubled with the completion of the construction projects included in the Commission's budget for the Government fiscal years 1951 and 1952. The existing plants and laboratories, including some new ones on which construction has begun, are spread among approxi-

mately 20 States. As of now there are about 90,000 people engaged in the atomic energy program in this country. Of these, less than 5,500 work directly for the Government. The rest are employed by more than 500 prime and major subcontractors.

The fact I want at this time most to emphasize to you is that almost without exception, these facilities are being built and operated by private industrial and research institutions under contracts with the Commission. There are virtually no direct Government operations in this field and the role of the Atomic Energy Commission is almost entirely confined to the planning and direction of the program and the administration of our numerous contracts and subcontracts.

I also want to emphasize the point that while the development and use of atomic energy is at the present time largely a Government undertaking, this may well change, although the change will probably come gradually. The Atomic Energy Commission has shown increasing interest in the possibility of participation by industry in the atomic energy program on a traditional profit and risk basis. One of the most interesting developments looking in this direction concerns the plan of several private companies to study the feasibility of constructing with private capital a reactor capable of producing both fissionable material and useable electric power. The fissionable material would be made available to the Government and private industry would utilize the power obtained.

The companies presently engaged in these studies at their own expense are the Monsanto Chemical Company and the Union Electric Company of St. Louis, Missouri; the Detroit Edison Company and the Dow Chemical Company of Midland, Michigan; the Commonwealth Edison Company and the Public Service Company of Northern Illinois; the Pacific Gas and Electric Company and the Bechtel Corporation of San Francisco. Still another company, the Bendix Aviation Corporation, has expressed an interest in the possibility of building a privately-owned reactor for the production of radioisotopes. At present, except for very small quantities which University laboratories are capable of producing, the Commission has a domestic monopoly on the production of these materials, although there is some participation by private companies in the manufacture of radioisotopes into useful compounds and in their distribution for research and industrial purposes. I am sure the insurance industry will watch these developments with interest and will recognize in them the need to understand and evaluate the safety aspects of atomic energy. It is certainly true that if atomic energy is to fulfill its vast promise in benefiting mankind, we must all learn to "relax" with the atom and to dispel the fear associated with the atom.

Because of our policy of operating through private contractors, we have used extensively the services of the casualty insurance companies. It has been the Commission's policy to allow its contractors to obtain both general liability and workmen's compensation insurance, except in a relatively few cases where the contractor is a qualified self-insurer in the area or where a state monopoly exists. On the other hand, we do not usually permit our contractors to carry fire and property insurance on Government property, because of the Government's general policy of self-insuring its own property losses. The fire and property insurance companies have, however, an inteerst in our casualty insurance arrangements, since they are the insurers of private property which might be damaged through atomic energy operations.

Many of our contractors' workmen's compensation and general liability insurance policies are retrospective policies modeled after the War Department Insurance Rating Plan of World War II or, more recently, the revised Defense Rating Plan. As you know, under this plan insurance premiums are adjusted retroactively, within certain top and bottom limits, to reflect actual losses incurred together with allowances for claims administration, taxes and litigation expense, and a fee for home office overhead and profit.

For certain of our operations, where the unusual nature of the operations and the problems of security appear to preclude normal insurance arrangements, the standard War Department and Defense Rating Plan policies have been modified to make the Government in effect the ultimate insurer of the risk. This modification commonly takes the form of an endorsement to the insurance policy which removes the

ceiling of "maximum" on the contractor's premium payments, so that the contractor's adjusted premium payments are directly related, without dollar limitation, to actual losses and associated expenses. Under this arrangement the insurance carrier normally looks directly to the contractor for the payment of all premiums, and the contractor looks in turn to the Government for reimbursement of those premiums under the terms of its contract with the Commission. While this has been the general pattern of most of our special insurance arrangements, there have been some variations on it, including in a few instances direct Government guarantees to the insurance carrier against losses and expenses in excess of premiums actually paid by the contractor.

The workmen's compensation insurance policies of our contractors are, of course, unlimited as to dollar amount in the coverage which they provide. The general liability insurance policies, however, contain some aggregate or per accident maximum coverage. This maximum varies considerably from one policy to another, depending largely on the coverage thought desirable by the contractor and the amount which the insurance carrier has been willing to provide. The contractor would normally look to the Commission for reimbursement of any liability claims which might exceed the insurance coverage, and most of our major contracts contain rather broad indemnity clauses covering such items.

From this brief description of our contracts and insurance arrangements you can understand why it is that most personal injury and property damage claims arising out of atomic energy operations have been covered by insurance. It is perhaps not surprising therefore that to date most of our claims have not presented very novel or unusual questions of law.

The safety record—that is, the actual experience—of the Commission and of the Manhattan Engineer District before it, measured in terms of insured losses, has been an outstanding one. The following figures are the combined experience of all operating contractors which have been engaged in work at Oak Ridge, Tennessee from the beginning of that installation until the present date. The figures for our other installations are comparable. These figures *do not* include any experience of construction or housekeeping contractors. The total payroll of all Oak Ridge operating contractors reported for insurance purposes to date is $303,000,000. The Workmen's Compensation insurance premiums paid to the insurance companies of these contractors is slightly over $1,500,000 for this same period. This $1,500,000 insurance premium paid to insurance companies includes all paid losses, all reserves for open cases, all expenses incurred by the insurance companies and an element of profit. Using these figures, we find that the actual cost of Workmen's Compensation insurance for these contractors has been about 50 cents per $100 payroll. I understand that a check of standard manual rates for workmen's compensation insurance shows that our Oak Ridge operating contractors have conducted a less hazardous operation than that of baby carriage manufacturing, butter and cheese manufacturing, and chewing gum manufacturing.

All the liablility exposures, including automobile liablility, for these same contractors, for this same period of time, based on the same payroll of $303,000,000, developed a total premium of approximately $96,000 which produces a rate of about 3 cents per $100 of payroll. You can see from this that the public liability insurance exposure has been insignificant.

One of the significant points about the safety record of the atomic energy project is that an almost negligible portion of our losses is attributable to any of the hazards that are more or less peculiar to atomic energy. There have been a few individual cases of radiation injury and a few cases of over-exposure to toxic materials. This safety record is due in large measure to the constant attention given by the Commission and its contractors to safety programs and to the establishment of tolerances for radiation dosages and other exposures which contain large safety factors.

We recognize that seven or eight years of freedom from disaster may not seem very impressive to insurance companies used to dealing with safety experiences compiled over a period of decades, particularly when dealing with atomic energy which is associated in the public mind principally with the largest man-made explosion in the history of the world. Nevertheless, the

record is impressive and we believe that insurance companies will find considerable comfort in some of the precautions taken against the possibility of disaster. We believe the insurance companies will take comfort in the numerous safety devices built into reactors and the safety review which each reactor receives prior to its construction and operation.

One of the problems the Atomic Energy Commission has faced is to give the insurance companies information about the atomic energy project. Possibly the fears of some members of the insurance industry have been based more on lack of information than on the hazards of atomic energy. Since a great deal of the information about our plants and operations is classified no real solution to this problem has yet been found. We have, however, made some progress. One of the more encouraging signs of progress occurred two or three years ago with the formation of the Joint Casualty Committee on Radiation of the Association of Casualty and Surety Companies. This Committee, on which three mutual and three stock companies are represented, serves as a focal point for the dissemination to insurance companies of information about the atomic energy program and presents the casualty insurance industry with an opportunity to make known its problems to the Commission.

One of the earliest concerns expressed by insurance companies related to the Commission's program for the distribution of radioisotopes to private research and industrial institutions. I am told that there was a good deal of uneasiness among insurance companies as to the possible hazards which might be connected with the use of these isotopes. For this reason the casualty companies were asked through the Joint Casualty Committee on Radiation whether they would not like to attend some short educational courses on radioisotopes and methods of radiation protection. They responded by requesting first a one-day course on the elementary principles on atomic energy which was given to some 300 insurance executives in New York. Subsequently, a somewhat longer course on radioisotopes was given to representatives of these companies at our Brookhaven National Laboratory on Long Island. In addition, the Commission makes available monthly to the Joint Casualty Committee on Radiation, for distribution to the casualty insurance companies, a list of our isotope distributions in order that they may know which of the businesses they insure are using radioisotopes and may make any necessary checks on their safe handling.

The Commission has worked with a similar committee of fire and marine insurance groups known as the Joint Fire and Marine Insurance Committee on Radiation. This committee has made available a means through which the fire insurance companies can obtain information for distribution to the members of the various groups and to work out problems affecting the mutual interests of the Commission and fire insurance companies. It has a Technical Subcommittee of four members who have been cleared for work in classified areas should this be necessary.

Some of you will also be familiar with the arrangements we have with life insurance companies who provide policies for employees of the atomic energy project. Early in 1947 arrangements were made with the Home Office Life Underwriters Association to have a representative of the Association cleared by the Commission for access to secret information, and to make a survey of the risks encountered in the various types of atomic energy work. Following the survey, each plant and laboratory has furnished the Association representative with a list of the job titles for all of its employees. The Association representative then surveys these positions and assigns a code number to each job title by analogy to similar jobs in a known field such as the chemical industry. Life insurance policies are then issued by the individual life insurance companies on the basis of this code. It may be of interest to you to know that there are no jobs in the atomic energy project which have been considered uninsurable and that only a very small percentage of the jobs have had to be rated-up due to hazards peculiar to the industry.

We are by no means satisfied that we have done all that could be done by way of keeping the insurance companies informed, and we are conscious that there are still some insurance companies who avoid insuring atomic energy work. We would welcome suggestions as to how this situation might best be improved and as

to how we might broaden the basis of participation by insurance companies in our program.

MR. HOLLIS: As Mr. Kelly and the other gentlemen and myself were talking earlier, we thought that having laid this broad base we might add some definiteness and concreteness to this discussion if I would open up by describing briefly the experience that we have had in connection with the fairly recent atomic tests out in Nevada.

As I believe most of you know, those tests did result in some small amount of damage to residences and stores in Las Vegas. One of the problems that we as lawyers had in the Commission was to examine the legal basis of the liability for that damage and, after much stewing about and analyzing the Federal Tort Claims Act and also taking into consideration the fact that if suits were brought and negligence was alleged the difficulties of handling a case like that would be very great, we decided that it would be a reasonable exercise of our discretion under the Federal Tort Claims Act to make payments for those damage claims under that Act. We did that in recognition of the fact that the Tort Claims Act basis of liability contains, I believe, the words "negligence and wrong doing." Certainly the Commission and its scientists and technicians by no means felt that they had in any way been negligent, but there was a reasonable argument that could be made based essentially on the word "wrongdoing" and the legislative history associated with that, to the effect that the government would be liable as an insurer.

In saying this I want also to say that we as lawyers for the Atomic Energy Commission viewed this as a reasonable exercise of discretion, recognizing that the interpretation of the Federal Tort Claims Act by no means leads without difficulties to this conclusion, and recognizing also that for claims over a thousand dollars had these claims gone to court the Department of Justice might well have felt that they should take a different position. I believe, as you know, under the Federal Tort Claims Act the executive agency has authority to settle claims for $1,000 or less, and it is my understanding that out of approximately 125 claims filed, 110 approximately have already been settled for a total sum of money of around $14,000. I think there are several still not settled and there was a surprising number, to me anyway, of claims that were just waived for patriotic reasons.

I think it will interest you to know also how the adjustment of claims was actually handled. In that regard the Atomic Energy Commission entered into a contract with the General Adjustments Bureau, who have had a considerable amount of experience in settling claims of this general nature. This bureau, pursuant to contract with the Commission, has gone out and has actually entered into the negotiations and settlements to be followed by payment from the Commission pursuant to the Federal Tort Claims Act.

MODERATOR KELLY: I thank you very much, Mr. Hollis. (Applause)

Mr. Hollis has touched on what many of us regard as the heart of the matter in his last few remarks in which he was discussing the question of the government's responsibility under the Federal Tort Claims Act. As he pointed out, in the Nevada situation there was some doubt as to, in view of the present wording of the Act, the government's responsibility in a situation which, as he also pointed out, every possible known precaution was taken at the time to make certain that damage of the kind that actually occurred would not occur. We therefore have asked Mr. Fellers, who, as I have said, is pinch hitting for Mr. Matthias, to discuss with you briefly the question of the present wording of the Tort Claims Act and the possibility of amending it in view of, shall we say, this new dangerous instrumentality to clarify the situation with reference to the liability of the federal government for damage to property or inuries to persons which may result from the out-of-control use or an accident involving materials subject to fission.

The Federal Tort Claims Act and its Application to Atomic Energy Cases

JAMES D. FELLERS
Oklahoma City, Oklahoma

I HAD occasion to notify the members of the subcommittee about the plans for this program and I said that the Chairman had arranged for the General Counsel of the Atomic Energy Commission to participate and also Russell Matthias, who has devoted a great deal of time and attention to the Federal Tort Claims Act, and that Ambrose Kelly was working on another expert to participate. I want to make it clear to everyone that I am not that other expert. That is Jack Faude, and you are going to hear from him shortly. I do realize that an expert under the timeworn definition is any of us who is more than fifty miles away from home. At any rate, I will try to pass on to you some of the thinking of our subcommittee.

In considering the question of liability of the United States Government in the event of loss to property or inury to persons arising out of the operations of the Atomic Energy Commission, our committee has made some study of the Federal Tort Claims Act. As you know, the 79th Congress as part of the Legislative Reorganization Act of 1946 enacted this law to subject the government of the United States to liability to its citizens for the tortious acts of its agents and employees. Prior thereto the United States had never permitted themselves to be sued for torts committed by their officers. There have been some limited types of litigation in which consents to be sued have heretofore been given—the Tucker Act, the Public Vessels Act, the Admiralty Act, and the Patent Act.

The purpose of the Federal Tort Claims Act was to make the United States liable to third persons for acts of its employees under the same circumstances as those under which private persons would be liable for acts of their employees according to the law of the place where the injury occurred. It did eliminate the necessity of burdensome consideration of private bills authorizing a suit against the government.

United States Circuit Judge J. C. Collet, in addressing a Missouri Bar meeting in 1948, proclaimed that this far-reaching Act was motivated by the high essence of American concepts of justice. His remarks point up the courage of Congress in disregarding the sovereign immunity of the United States in Tort actions and in opening an unpredictable and staggering field of possible liability.

When the Fire and Inland Marine Insurance Committee met at White Sulphur last year it was agreed that it was necessary and desirable to establish the degree to which the United States Government or the Atomic Energy Commission was responsible for losses to property resulting from explosion or fire at properties under the control of the AEC. Some of the new installations of the Atomic Energy Commission are located in areas of high population density, such as the laboratory at Brookhaven on Long Island and the Argonne laboratory near Chicago. Although the possibility of an accidental explosion or an accidental chain reaction appeared extremely remote, it was felt that it would be helpful to determine the exact legal liability status of the government. The damage done at Las Vegas and other localities in the vicinity of the government-sponsored test operations this last year demonstrated that the question was real and vital and not merely an interesting and theoretical possibility.

In studying this question of liability of the Federal government we found that one United States court, a district court in Maryland, in the Englehart case had held that in considering the intention of Congress with respect to the scope of the Federal Tort Claims Act the practical aspects of cases likely to arise under said act were relevant.

It may be of some significance that the Atomic Energy Act of 1946 was approved on August 1, 1946 and the Federal Tort Claims Act was approved on August 2, 1946. The scope of liability of the United States under this Federal Tort Claims Act

is measured by Section 1346 (b), Title 28 of U. S. Code Annotated, which provides in substance as follows:

The district courts shall have exclusive jurisdiction of civil actions on claims against the United States for money damages for loss of property or personal injury or death caused by the negligence or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstance where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

It is submitted that the language of this section is broad enough to cover the liability of the Federal government by reason of the negligent acts of the governmental agency, the Atomic Energy Commission. From this particular section we deduce at least four tests:

a. A negligent act.

b. By an employee of the government.

c. Acting within the scope of his or its employment.

d. Where liability would be imposed by the law of the state where the tort occurred.

Our primary inquiry has been directed to our point b as to whether it can be said that employees or private contractors working for the Atomic Energy Commission can be said to be employees of the government within this provision. We have located a recent case which already has held as much. The case of *Sanchez versus the United States*, which is in 177 Fed. 2nd 452, is a suit against the government by reason of the alleged negligence of an employee of the United States, actually in this case a Security guard of the Atomic Energy Commission base at Los Alamos, New Mexico. Here a child had been lost in the neighborhood and the New Mexico state police requested that the Deputy Chief Inspector of the Atomic Energy Security Service cooperate in finding the child. An AEC guard, one Loveland, was off duty and volunteered to help in the search. He was permitted to use a radio-equipped government automobile. After the child was located it was injured by reason of Loveland's negligent operation of the government vehicle. The court held that the United States was not liable under Section 1346 for the reason that Loveland was not acting within the scope of his employment at the time of the tort, that is, the case went off on our point c about the scope of employment. The case necessarily however passed on the question that a security service guard of the Atomic Energy Commission is an employee of the Government within Section 1346 of the Federal Tort Claims Act. That was decided by the Tenth Court of Appeals and Judge Phillips in his opinion pointed out that the duties of the security service guards are to maintain internal security on the installation and to prevent ingress to and egress from the installation by unauthorized persons. He pointed out that it was customary for the officers of the security service to cooperate with local police officers and that when the request came the head of the Atomic Energy Security Service did call for volunteers and that this party did volunteer and that he was given permission to use the government vehicle, but he said that by engaging in the search he was not engaged in any activity relating to his duties as a member of the security service and he performed no act for the benefit of the United States Government or the Atomic Energy Commission. He also pointed out that the government vehicle used by him in the search was not used for any activity in furtherance of any business connected with the United States or the Atomic Energy Commission. He was acting as a volunteer and was not acting within the scope of his office or employment.

The language of the opinion very clearly indicates that if he had been within the scope of his employment the United States government would have been liable and that he was an agent or an employee of the government.

It is our opinion that the result would be the same as to contractors hired by the Atomic Energy Commission so long as it could be said that the AEC controlled the details of the performance of the contractor. This assumes that the state has the usual common law rules of master and servant and that there are no bars by reason of local statute.

In Judge Collet's paper he expressed the opinion that comparatively few questions involving the construction of the Act will arise. He had talked personally with the Attorney General of the United States and

had been assured that only questions of real merit would be raised in defense. One of these meritorious defenses involves a question of particular interest to those engaged in insurance defense work. The attorneys in the Department of Justice took the position that only direct claims against the government were authorized to be asserted in these statutes, and the claims derived from assignment or subrogation rights were not authorized. The District Courts ruled variously on this question throughout the country. Some of them held that the Act gave only the citizen the right to sue the sovereign and that subrogation was of the same nature as assignments and hence was not permitted.

The confusion seems to have arisen because of the Anti-assignment Act which, as you know, is Title 31, Section 203, of the United State Code Annotated, and also by raising the issue as to whether the subrogee company is the real party in interest. Appellate Courts have since held that an insurer which became subrogee could maintain an action against the United States and that the Anti-assignment Act has reference only to volunteer assignments of claims and does not involve subrogation. I believe this question has become settled by the recent decision of the Supreme Court of the United States in the case of the United States versus Aetna Casualty & Surety Company, wherein it was held that an insurer which by operation of law has become subrogated to the rights of an insured who could have brought suit against the United States under this section is a real party in interest and every action shall be prosecuted in the name of the real party in interest. Such insurer may bring actions under such section in its own name against the United States. It would appear that that question is fairly well settled.

Another question which has been under consideration is whether the Act permits the joinder of the United States as a codefendant with an alleged joint tortfeasor. In the Englehart case from Maryland, the District Courts held the joinder permissible and the District Court Judge presided at a single trial where he was called upon to decide the case against the United States without a jury and the jury heard the case against the codefendant. The jury found for the plaintiff as against the codefendant and fixed the damages at $3,000. The judge then found the United States liable and also assessed the damages at $3,000. The government did not appeal this case, but it is understood that the individual defendant promptly paid one-half of the judgment.

Since that time the Court of Appeals in several circuits have passed on this question and have upheld the right to bring suit against joint tortfeasors.

It is an interesting problem and naturally the Department of Justice was thinking about the result where a judge might think a plaintiff was entitled to more or less than the jury verdict. The Act, as you know, provides for non-jury trials against the government.

The joinder of an employee of the government is another question that has arisen. The Department of Justice believes that a plaintiff suing the United States under the Act has elected to proceed against the United States alone and may not join or interplead the employee in the same suit. The Act provides that where there is a compromise or settlement or where judgment has been obtained by a claimant in an action against the United States that such compromise or judgment shall constitute a complete release to the employee. The District Court for the Western District of Washington in the Keith case agreed with Keith in this matter.

There are a number of questions of this kind which have arisen and which have not been completely clarified. Mr. Hollis may have some further information about this employee situation, about recent determinations by the Supreme Court of the United States, but it was the thinking of our Committee on Federal Legislation that the Act should be clarified so as to allow the joinder of the United States as a codefendant as could be done in any other civil suit in a United States court.

Among other suggestions made by our committee was one that provision should be made whereby the owners of numerous small damage claims, perhaps each under $3,000, might assign those to one person who could bring an action against the United States under this Act, and it is suggested that when the Act is clarified that it also be spelled out that a subrogee may aggregate all claims arising out of the same facts so as to constitute for the purpose of satisfying the minimum jurisdictional amount a true class action. It is clear that under this section a claimant

must base his action on a negligent or wrongful act, and those on our committee have felt that it should be amended to embrace the situation of the Atom Bomb explosion where the government activity is inherently dangerous and as such no amount of care or caution would have prevented the damage or injury. While it might be argued that the theory of negligence may also embrace the subsidiary theory of strict vicarious liability, still it would seem wise to clear up such an ambiguity if the government intends to construe the Act strictly.

Without putting all the emphasis on that point of clarifying the government's liability, I do want to pass on to you one further view and opinion which is a little bit to the other side; that is, some of our members have indicated that they felt that it was most important for private insurance companies to assume as much responsibility as possible in insuring against damage that may arise in connection with the development of atomic energy, looking forward to peace-time development of this great undertaking. It is my understanding that some fire insurance companies already are taking the position that their standard fire policy, which includes a clause relative to explosions, covers damage sustained as a result of any kind of explosion that occurs in connection with the construction of any atomic energy plants or in the course of its operation. This appears to be good public relations. If private companies extend coverage as far as possible consistent with the financial involvement that may occur, it should be an effective device to avoid the entrance of the Federal Government into the insurance picture in this connection. I am in favor of the Federal Government inserting itself into a situation only in the event that private enterprise cannot do the job itself. I believe the insurance industry should be able to do this job and every effort should be made in that regard. (Applause)

MODERATOR KELLY: Before you get too far away, Jimmy, I wonder whether you and Mr. Hollis would like to discuss what seems to me to be the heart of the whole problem here, to elaborate on this question of the government's responsibility by reason of the fact that it has released into the economy, generally under its supervision and under procedures established by it, a material which might be held to be inherently dangerous; that is, in cases involving fissionable material or radio-active material. Are we going to have to depart from the standard rules of negligence and the standard rules of tort liability to the point where the government, because of its control of the entire program, must act practically as a guarantor, and in the event of any injury or damage occurring accept responsibility for that on our old common law rules that it released to the public a dangerous instrumentality? Would either of you care to comment further on that?

MR. HOLLIS: As I stated in my opening remarks here, we really have not had very much experience yet in actual damage resulting from the atomic energy industry, that the Las Vegas tests and Nevada tests did afford us the first real concrete example, I believe, of the kind of problem that we are discussing here this afternoon. We do have a hunch, however, that the problems in this field are not going to turn out to be fundamentally different, that is, the legal principles involved. We do not believe that the legal principles involved are going to be fundamentally different from the legal principles applicable in many other instances.

One example I have in mind and one set of facts that we are trying to get our hands on now to be able to think clearly about, is the experiences that already exist throughout the country with the government and with the insurance industry on non-combatant military activities. For example, what happens in the case of a non-combatant military aircraft where as a result of no negligence at all on the part of the pilot, he being in the scope of his duties, he crashes into a building? Should not the problems in the atomic energy field be approached from that same angle?

Take also the cases of military explosions, cases of guided missles. As I say, we have not been able to get a hold on what the interplay between the government and the insurance industry is in those cases, but we do have a strong guess that the principles applicable there, which perhaps could be built up over a period of time, are also applicable in our case. I think also in this connection that there is an important problem here with reference to the relationship between the government and the atomic energy program as to how these matters are going to be handled between the following two general courses of action: One, is the

course of action we followed in the Nevada test, whereby the government pays off the claims, insured and uninsured, and wherein the role of the insurance industry has been by contract with us, to act as an adjuster for us, to be followed, as distinct from the situation where the insurance industry writes coverage for these claims and then by virtue of rights that Mr. Fellers discussed reimburses itself from the government.

I think that those two alternatives are probably available.

MR. KELLY: I think at this time we had better give the audience a chance.

MR. J. HALLMAN BELL (Cleveland, Tennessee): Under the laws of Tennessee in the case of damage from explosion you do not have to prove negligence. Under the latter part of this Act there is a provision in regard to other claims under the same law. Would the same thing apply in a state like Tennessee where you do not have to prove negligence as would apply in a state, say, like Maine where I think you do have to prove negligence?

MODERATOR KELLY: Have all of you heard the question? Under the laws of the state of Tennessee it is not necessary to prove negligence in the event of an explosion, and it is a presumption that you have a prima facie case in that respect.

MR. BELL: The courts hold that persons who use explosives do so at their own risk and all you have to prove is the damage.

MODERATOR KELLY: Mr. Bell raises the question as to whether that situation has been taken into account and whether similar rules exist in other states; and in some states a different rule does exist. I know we run into it in the insurance field in blasting cases and there we have a determined fight on our hands in every case, since the contractor tries to set up the fact that the operations have been conducted with due care and diligence and that there is no responsibility. There, of course, we get into the question of whether the damage is alleged or actually due to the blasting, since they may not involve such a matter as a rock coming through the roof but they may involve cracks due to alleged vibrations and you do not know whether the damage is attributable to the explosion. Mr. Hollis or Mr. Fellers, would you care to comment?

MR. HOLLIS: I am sure both of us will disqualify ourselves. Well, the comment that I would make on that is as follows: I understand generally along the line that Mr. Kelly has just stated that where there is a physical invasion from explosion that virtually all states hold absolute liability, but there is a split in the jurisdiction where you have damage resulting from simple concussion, which is what I gather you are talking about. Back in the Federal Tort Claims Act the liability of the United States, as we have mentioned before, is bottomed on negligence or wrongdoing, but the overriding principle of the Act as I understand it is that the United States shall be liable where private persons would be liable in accordance with the law of the place where the act or omission occurred.

MR. BELL: That is the section that I say under the law of Tennessee they would be liable without proving negligence.

MR. HOLLIS: This may result perhaps unfortunately in divergent results in different states.

MR. FELLERS: Mr. Bell, I think you will find that there have been cases both ways at this point. There are some cases which hold, as Mr. Hollis suggests, that the spirit of the act is such that they would be covered, whereas others have held that a strict construction applies in view of the sovereignty, and the king can do no wrong, and that sort of line that we have always heard.

I was trying to put my finger on a Florida case here where a similar question was involved and I believe in that one they held that regardless of Florida law it was not covered, but the purpose of the Act has been held both ways by various courts.

MODERATOR KELLY: We will see that you get a chance to take the case to the Supreme Court and fight it out.

A MEMBER: Why wouldn't the common law doctrine of *res ipsa loquitur* apply to these cases?

MODERATOR KELLY: In the discussion Mr. Fellers' committee did give some attention to that and it was felt that it very well may apply.

Jimmy, why don't you fix that up?

MR. FELLERS: I was trying to cut this a little short to give you an opportunity to hear from Expert Faude, but that question has been considered by our committee and those who studied it failed to see how the

security restrictions would prevent claims under the Act. The usual state rules with regard to *res ipsa loquitur* action should overcome this obstacle. The three basic conditions of every *res ipsa loquitur* case are that the apparatus normally operates without doing injury, that the instrumentality was in control of the defendant, and the injury must have occurred irrespective of any voluntary action of the plaintiff. It is submitted that the proper application of this *res ipsa loquitur* doctrine would surmount the plaintiff's suit, notwithstanding the requirement that there be a normal, safe operation. The test should drop out in favor of the proposed suggestion to the effect that the activities are inherently dangerous and therefore covered, but it seems to us that perhaps that is another question that should be clarified by amendments to the legislation.

MR. CLINTON M. HORN (Cleveland, Ohio): The doctrine of *res ipsa loquitur* is purely an evidentiary rule, a procedural rule. It has nothing to do with a substantive right of action.

MODERATOR KELLY: What we are looking for is something beyond the procedural rule, to a recognition on the part of the Federal Tort Claims Act that where you are dealing with a substance or a material which is inherently dangerous in itself that there should be—I hate to use the term "absolute liability on the government"—but a rule that it would be merely necessary to prove that the injury resulted from the actual accident involving a dangerous substance. In other words, we are moving toward your explosion rule in applying perhaps that same rule to a wider range of cases outside the explosion field. In several informal discussions we have had on this question it has always come out that what you have to do in considering atomic energy, in considering material which is subject to nuclear fission or radioactive isotopes, is to apply the same old rules of law that we have always had to the new factual situations which are brought out. I think Mr. Hollis in his paper stressed the fact that in its insurance operations the AEC has found that the standard coverages can be applied and that you are not running into situations which are too unusual. Here what we have to do is to adopt, as we have it in any number of fields, the same principles which are recognized and followed in other types of cases, in which the injury or damage is the result of the careless use of fissional material or perhaps an accident which goes beyond care, which was merely the result, as the damage was at Las Vegas, of a completely unforeseen result of a standard operation. Because the behavior of the shock waves, for example, in that case is something which is not yet fully known and understood. In those explosions, as I am sure all of you realize, the government had definitely in mind the hazard to surrounding property and at the time of the explosion felt that there was no possibility of damage to property in the hands of private parties. Yet by reasons of physical conditions and the behavior of a blast wave which is not yet fully understood, we did have damage done. In that case you are moving over into the field of holding them liable because of their release of a force which is inherently dangerous in itself.

This is an interesting discussion and it is one that I for one could go on with all afternoon, but we did want to spend just a few minutes on the discussion of the practical problems which are involved under insurance contracts today where radioactive or fissionable material is involved. I wonder whether Mr. Faude would care to comment on any problems which may arise, say, in the field of workmen's compensation where the employee is using fissionable material or radioactive material. Do we run into situations which are out of the ordinary, or is it going to be pretty much routine stuff, Jack?

MR. JOHN FAUDE (Hartford, Connecticut): The problems in insurance I think have already been mentioned, and the rules of liability will probably be normal adaptations of what we have seen in other situations. The coverages themselves are already broad enough in most instances to pick up whatever consequences in the way of damage or personal injury come from this new source of damage. I think the chief difference to insurance companies, casualty and property insurance companies, is the new type of safety engineering that has had to be devised to cope with the problems; for example, the shipment now of the radioactive isotopes to laboratories and hospitals requiring special protective devices. Details are given by the AEC, as I understand it, in connection with all the shipments to licensed purchasers and the insurance companies perform their own safe-

ty engineering on the other end. So far, I am told, as a result of the recognition of the danger and the satisfactory working of the protective devices the hazard is less than that of the normal X-ray exposure in that way.

As far as the workmen's compensation field goes, I see no reason why radiation sickness is not another occupational disease and why it would not be handled the same way from an insurance coverage standpoint as occupational disease is now.

MODERATOR KELLY: Jack, in a case in which you have a state without occupational disease as part of its workmen's compensation and you are writing an employers' liability endorsement, would you in your judgment pull in such disability from exposure to radiation as an accident?

MR. FAUDE: If the illness resulted from a single exposure or a short-lived exposure, I would think that an accident could be made out, yes. If it required exposure to the source over a period of days, weeks, or longer, then the more traditional test of occupational disease would seem to be met.

MODERATOR KELLY: When we come to the question of public liability, either OL and T or comprehensive public liability, are we not going to run into unusual factual situations in dealing with radioactive substances? I remember, and I am sure you remember the article, of the time a hot wrench was taken away from I think the Hanford plant by a watchman. It had been exposed to platonium and it was contaminated. He took it home. He contaminated the bus that he rode on. He contaminated his house. He might have caused personal injuries to other people who came into contact with the wrench. It happened that it was discovered very soon and there was no ultimate harmful effects, but suppose you have that sort of a situation where yau are writing a liability policy for the contract; do you feel that in that case we would be involved in a possible claim under our coverage as it stands?

MR. FAUDE: Yes, I believe as a liability policy the concept of cause by accident could be made out on that immediate exposure, which takes care of the bus and the home and everything else. I think that would be covered now. There is a liability coverage and rather than specific peril coverage it arises out of the operation at the described premises or whatever it is. There would be a field that I have not heard discussed that occurs to me as potentially raising new problems, the field of products liability. I do not know what the manufacturers of the various protective devices that are needed have done to protect and ward off these radiation matters, but if someone manufactured a defective protective device, then you would have a new type of products liability exposure and your products underwriter would have to start thinking about that.

MODERATOR KELLY: What about something like a tracer lab where you have a business which is processing radioactive isotopes and supplying them to hospitals and research institutions? How would you like to write a products liability policy for them?

MR. FAUDE: I am not establishing the rate. I would think the rate would have to have a lot of special care.

MODERATOR KELLY: But as far as the problems which we would face in the writing of our contracts for the adjustment and settlement of our cases, there would really be nothing new involved, would there?

MR. FAUDE: You get a possible extension under contractual liability that may be brought out which would require a rating. If a tracer lab by agreement with the supplier takes on increased liability over what would be its normal legal liability, that would impose a contractual hazard on the liability insurer. Most contractual liability when it is afforded is either afforded with respect to a specific contract, or is afforded on a blanket basis, so you do not have the coverage question; it is largely a rating question.

MODERATOR KELLY: Are there any questions that any of you in the audience would like to ask Mr. Faude?

MR. J. RALPH DYKES (New York, New York): Is there any trend or thought toward making the liability of the government growing out of this thing you are discussing negligence per se or do the same principles which arise from the use of an inherently dangerous instrumentality apply?

MODERATOR KELLY: This is the same question that you were raising earlier with respect to the Federal Government. Would you like to apply the same rule to the private contractor or industry estab-

lishment which is using or sending out such things as radioactive isotopes?

MR. DYKES: No, I was really wondering if there had been any trend or any thinking toward the courts probably holding the release of atomic energy where it does do damage as being an inherently dangerous thing and establishing negligence *per se* without approving or following along something of *res ipsa loquitur*, which is procedural of course and does not establish anything.

MODERATOR KELLY: I follow your question and I would like to ask other members of the panel. My strong feeling is that there has as yet been no case which has been brought into any court of final jurisdiction involving either damage or injury from fissionable material or radioactive material. We have had of course the iranium cases which are somewhat closely to it, but I would like to ask the members of the panel if they know of any case.

MR. FELLERS: Mr. Chairman, there have been no cases involving atomic energy. However on the question as to the trend, there is a case where the District Court in Florida considered the case of a government plane—it was disabled—being towed down the highway and the court held that that did not constitute a wrongful act so as to authorize recovery regardless of negligence for any injuries between that airplane and another automobile that was going down the highway.

On the other hand, there is another case from South Carolina where it was held that the United States had knowledge through its officers in charge of a federal quarantine reservation that young boys were tampering with shells on the premises and had actually obtained explosive powder there and they had used the powder for firing a toy cannon, but the officers did nothing to prevent these activities, and the court said they thus acquiesced in a train of circumstances which culminated in an explosion in which a boy was seriously injured and that the explosion and resulting injuries were caused by negligence. They called it negligence in that case, both active and passive, of the officers and held the United States Government liable, which seems to be going very far.

This while question about inherent danger depends upon the facts; the negligence depends upon the development of the facts. In the hot wrench case that Mr. Faude mentioned, it occurred to me that it might be a defense without the scope of authority there in carrying the wrench home on a bus by himself, but suppose one of these contractors that is working on some phase of the atomic energy program has an explosion; how are you going to prove that there was any negligence there?

MR. DYKES: There is negligence per se.

MR. FELLERS: The general public is foreclosed from making any investigation as to the cause of the damage for security reasons and that is what promotes this whole idea of making the government responsible because it is dealing with an inherently dangerous object. We cannot get to it and investigate and determine whether or not it was negligence.

MODERATOR KELLY: With the help of Mr. Faude I want to discuss with you very briefly the question of the present statute with respect to what we might call property damage contracts, which of course cover fire and the like, explosions primarily. It is a situation that pertains to you as insurance attorneys because in the companies, as with lawyers sometimes, there is a difference of opinion. Under the standard fire policy as it reads at present there is no exclusion other than the war risk exclusion which would apply to fissionable material or radioactive material.

In consequence, if as a result of an atomic explosion in test time or any accident involving the release of energy, and of course as you all know that energy is generally released in the form of heat, a fire should ensue and the person whose property is destroyed has fire insurance, there is full coverage at the moment, so long as there is no hostile or warlike act, for the resulting damage. And that is true if there is a peace-time explosion of an atomic weapon.

The National Board of Fire Underwriters, which is the major organization in the field, has been giving careful consideration to this problem and at a special meeting held in May it decided as a question of policy that the fire contract should be amended. I cannot quote for you the exact wording of their resolution because I do not have it, but the sense of it was that the fire policy should not cover damage by fire which was the result of an explosion by an atomic weapon of war in time of war or peace. In order to make that decision effective as far as the policy holders of the

country are concerned, it would be necessary to change the standard fire policy as is presently used. That standard fire policy is in many states a statutory policy and any change in it can only be made through legislation.

The situation is further complicated by the fact that the United States Government, speaking for all of us, is at the present time giving earnest consideration to the problem of war damage insurance or war damage indemnity. A number of bills have been introduced in Congress, have been referred to the proper committees, hearings have been held, and there is a wide difference of opinion as to the method which should be followed by the government in providing indemnity or insurance for persons whose property or whose persons are injured as a result of the war risk itself, and of course that ties in with the atomic hazard in the minds of most of us who have considered it.

Now, the standard fire policy is a statutory document. The extended coverage endorsement, on the other hand, is one which is outside of the statutes and which may be amended by the companies any time that they choose. A number of the jurisdictions have adopted an exclusion for the extended coverage endorsement. It is really a modified, amended war risk exclusion in which they attempt to take care of the problem specifically by adding to the regular war risk exclusion the following language:

> "It being understood that any discharge, explosion, or use of any weapon of war employing atomic fission or radioactive force shall be conclusively presumed to be such a hostile or warlike act by such a government, power, authority, or force."

In other words, they have amended the war risk exclusion to state that there will be a conclusive presumption that the discharge, explosion or use of a weapon of war employing atomic fission is a hostile or warlike act and therefore under the war risk clause.

As I said earlier, there is a difference among insurance companies as there is among attorneys often, and at the present time there is at least one group of companies which is not yet willing to subscribe to that point of view because, as was stated earlier by Mr. Fellers, they feel that the private insurance carrier should afford to the members of the public complete insurance protection wherever possible and they feel that the chance is remote of loss or damage by such an explosion in time of peace now of an atomic weapon of war, and that even if an explosion does occur accidentally and damage results, that part of the obligation of the insurance companies is to provide the necessary protection against such damage and therefore they should continued to afford such coverage.

The companies which hold a contrary view do so on the simple argument that the hazard is uninsurable and that if such an accidental explosion were to take place in the wrong area—say the Harbor of New York City—it would throw such a burden upon the existing insurance companies that they would not be able to meet the strain even though they might have a possible action against the government under subrogation. There would at least be a period of time in which they would be liable under their own contracts and they would have to finance these claims pending the successful conclusion of a subrogation action against the government. I think their experiences at Texas City have left them just a little shy on the subject because there, of course, a very substantial part of the damage done and the injuries sustained were compensable under insurance contracts.

The insurance companies as subrogees have a very substantial case pending against the government and it is probably going to be some years before there is a final decision in the case. In the meantime of course insurance company funds have been used to pay the losses. Texas City was, despite its size, regarded as comparatively minor compared to the possible damage which might result from the explosion of an atomic weapon of war.

We promised you earlier that we would discuss briefly before we close the present situation on war damage. I think I have gone over some of this. The interesting point is at the moment—and this is aside from our basic subject—that two radically different theories are under consideration. One is the provision of an insurance program somewhat similar to our program of last year under which people will purchase insurance against war damage, paying a premium for it, and only have coverage to

the degree that they hold a contract. The other theory is that the government should provide, as it did in some of the European countries faced with the same problem, not an insurance policy, but a plan under which people who suffer loss can be indemnified without buying a contract or paying a premium, but in which the adjustment facilities or the administrative facilities of the insurance companies could be used to handle adjustments just as they have been used by the Atomic Energy Commission, except on a much wider scale, as a result of the Las Vegas evplosion.

When we originally scheduled this program we thought we might have some definiteness for you, but Congress has not felt that there is any urgency in the situation and it seems doubtful that there will be any war damage legislation before the close of this year. Before we close this session, might I ask if there are any questions on any phases of this subject that we have not covered?

MR. FAUDE: I thought you might emphasize that in your excellent summary the exclusion being considered is a weapon of war exclusion and not some general release of atomic energy itself, and then to be sure the companies that want the specific exclusion have Texas City in mind and they also may have Black Tom in mind and the inability to prove whether it was a hostile act. They do not have Nevada in mind although it is very difficult with the same language to exclude Texas City in this respect and not literally to exclude Nevada.

MODERATOR KELLY: I am sure you all recognize the point he is trying to make. As we come to the peacetime development of atomic energy, as was mentioned in Mr. Fellers' remarks, we have now nuclear reactors operating in a large number of areas in this country and if there were to be an atomic explosion to one of those which resulted in substantial damage to surrounding property it would not be excluded under the type of exclusion which has been suggested. The only thing that would be excluded would be, say, the accidental explosion, and I am sure this almost certainly cannot happen, the accidental explosion of, say, the components of an atomic bomb while it was being transported from the place it was being made and manufactured and tested to some other part of the country.

I do not know whether any of this is of any interest to you, Mr. Hollis. Would you care to get into the discussion at all, or have you said what needs to be said?

MR. HOLLIS: I do not care to comment.

MODERATOR KELLY: I think that you owe a vote of thanks to the three members involved here. I think they have done an excellent job in covering this subject and I know that we on the panel owe a debt of gratitude to you loyal souls who resisted the blandishments of the golf course and the Old White Room and stuck with us to the bitter end.

May I turn the meeting back to Mr. Moody, who will officially conclude it. (Applause)

MR. MOODY: I have been asked to announce that the Nominating Committee will go into session immediately, and to call your attention also to the continuation of the Open Forum in the morning. It will bring up that hot subject of home office counsel and trial counsel that provoked so much interest last year, so let's try to be on time. That is all.

(Whereupon at 5:15 p. .m., Thursday, June 28, 1951 the Open Forum was recessed, to reconvene at 9 o'clock a. m., Friday, June 29, 1951.)

OPEN FORUM

24th Annual Meeting of International Association of Insurance Counsel

Home Office Counsel—Trial Counsel

LESTER P. DODD, *Chairman*

FRIDAY MORNING SESSION
June 29, 1951

The third Open Forum of the Twenty-fourth Annual Convention of the International Association of Insurance Counsel, held in the Auditorium of The Greenbrier, White Sulphur Springs, West Virginia, convened at 9:15 a. m., Wayne E. Stichter, President of the Association, presiding.

PRESIDENT STICHTER: We are slow in getting started this morning. I guess everybody had too good a time last night. We cannot even find the first speaker. In the meantime I have an announcement I would like to make.

Yesterday I told you that the Nominating Committee would be meeting in the Chesapeake Room down near the liquor store. It seems that most of our members have already supplied themselves with liquor and therefore did not have much occasion to get down there, so we changed the meeting place. The Nominating Committee will meet today in the Washington and Lee Room, which is directly across from the Old White Club. They will be in session between 10 and 12 o'clock this morning and between 8 and 10 o'clock tonight. They are very anxious for those of you who have any suggestions to make them as early as possible.

MODERATOR DODD: I think we are ready to go now, and I think in fairness to Frank Van Orman he ought to be told what was said about him during his absence here and that is, Frank, that Mr. Eager said it was not surprising that a Home Office man would be late as he would be late to his own funeral. He also observed that he was quite sure that this would be a one-sided argument anyhow.

This, ladies and gentlemen, is a continuation in a way of a little fracas that was started here last year. We have streamlined it a bit this year. Some of you that were here last year may recall that there was some criticism directed at the selection of Trial Counsel as not being from the northern metropolitan area, so we have corrected that situation this year by having the Trial Counsel point of view presented by a gentleman from that thriving metropolis of Jackson, Mississippi.

I have been asked particularly in setting up this program to avoid using the term "relationship." Last year we called this a discussion of the Relationship existing betwent Home Office Counsel and Trial Counsel. This year I was requested particularly to avoid the use of that word "relationship," so, as you will note from your programs, this has been set up merely as "Home Office Counsel—Trial Counsel."

You will hear from Home Office Counsel in the person of Mr. Francis Van Orman, Vice-President and General Counsel of Bankers Indemnity Insurance Company, whose subject, deliberately chosen, is "Home Office Counsel Makes Some Random Observations on Local Trial Counsel." Mr. Van Orman. (Applause)

Home Office Counsel Makes Some Random Observations On Local Trial Counsel

FRANCIS VAN ORMAN
Vice-President and General Counsel, Bankers Indemnity Insurance Company
Newark, New Jersey

I HAVE been asked to make some random observations on local counsel and I am not unmindful of the risk. I am acutely aware of the fact that I am addressing the most distinguished of local counsel, the cream of the local counsel crop.

Accordingly, it seems to me to be most appropriate that I say at the very beginning that it is my earnest conviction that local counsel are the salt of the earth, and except for observations most complimentary in nature, there are very few observations to be made. However, I am here to make the few, or some of them.

I firmly believe in the value of a preliminary opinion from local counsel. This should probably be given at the time the pleadings are drawn. It should reflect a thoughtful analysis of the case and should include such recommendations as can be made at this early stage. This is the place to disagree with any opinion already in the insurace company's file and also the place to suggest settlement if counsel believes the case should not be tried. Points for further investigation should be noted, but counsel should be thoughtful about these and avoid the shotgun approach. If he wants to keep on good terms with the adjuster he should ask for no more than the investigation he needs.

Local counsel should not exaggerate the dangers of a case or the value of a case in his opinion. This is especially important when the ad damnum exceeds the limit of liability of the policy. In the event of an excess verdict, the insurance company is bound by his opinion of value and may have to pay the whole judgment as a result. Most counsel are not guilty on this count but there are too many who build up the case so that they will have greater credit for a win and more protection when the jury brings in the wrong answer. A really worthwhile preliminary opinion will do local counsel more good in his relations with the insurance companies than almost anything else. It is good for him because it hardens his thinking on the case and it is of great assistance to the insurance company. However, counsel will be judged by the opinion not only as of the time he gives it but in the light of what he said just before trial and just after trial so he must make certain it is his considered opinion.

In making recommendations local counsel should bear in mind that home office counsel is not likely to know the peculiar local conditions which are likely to influence the decision whether to stand trial or not, and the valuation of a case for settlement. An important recommendation should be supported by a recital of all factors taken into account by local counsel in arriving at his opinion.

Local counsel should send in a brief report if depositions are taken and another brief report covering any pretrial conference or other event of significance. As the case approaches trial he should be sure to report this fact, allowing ample time for review and conference where necessary. Insurance companies are inclined to look with disfavor on counsel who telephone on Friday afternoon to report the case is No. 1 on Monday's calendar. When there is an adverse result, he must report on it fully and frankly, and be sure to advise an appeal or not. If he thinks there should be an appeal, he should set forth the precise grounds on which he will rely if authorization is granted. He must lay it on the line; generalities will not do. If an appeal is taken counsel should be sure to send in a copy of any printed record and any printed brief including, if possible, the brief of his adversary. Strangely enough it is most unusual for local counsel to send in records and briefs except upon request and the reluctance to send in the adversary's brief is quite remarkable.

The responsibility for the proper handling of the vast amount of litigation in

which the insurance companies are interested is divided between home office counsel and local counsel. Perhaps it would be more accurate to say they have a joint responsibility. Each has his important part to play, and neither can play his part without regard to the other. Harmonious coordination is essential, and in my experience, rarely lacking. The success of each depends upon the good work of the other.

Now and then I hear things from which I infer that some local counsel resent "interference" from home office counsel; that some local counsel would rather operate strictly on their own with respect to litigation assigned to them; that no assistance is needed from home office counsel. Local counsel who have this point of view overlook the fact that insurance corporations, in the nature of things, must act through men who have special delegations of authority. With respect to its litigation, home office counsel is the official for his company to whom all authority is delegated. He is the one who is held responsible for the results. In a very practical sense, he is the insurance company so far as local counsel is concerned. He is the client.

If a client has the right to speak up to his lawyer, then home office counsel has the right to speak up to local counsel on matters in general and on cases in particular. Because home office counsel is also a lawyer, he is no ordinary client. By training and experience he is qualified to deal with matters in the hands of local counsel as an associate lawyer. His participation should be welcome. After all he is the one with the final authority and the one responsible for the results.

Home office counsel must pass judgment on the work of local counsel and on local counsel's valuation of his own professional services. As a result, the relationship between home office counsel and local counsel provides certain special irritations beyond the irritations inherent in the ordinary attorney-client relationship. Mutual understanding and tolerance is indicated. Liaison problems there are and always will be, but they can be minimized by a practical approach seasoned with mutual respect. It is wholly impractical to resent home office counsel who wants to put his oar in on a case, and it is pointless to be sensitive when a recommendation is rejected in whole or in part. Home office counsel is duty bound to use independent judgment, and may even have sound reasons for differing with local counsel. Two heads are sometimes better than one.

I suggest that fee bills be quite detailed and show as a minimum the work done, the time spent and unusual problems if any. The insurance companies expect to pay the fair and reasonable value of a lawyer's services but the burden of proof is on the lawyer. It should be remembered that each fee bill is examied and those which are not fair and reasonable on their face are referred to home office counsel for decision. It is just horse sense to make each fee bill sufficiently complete so that it is likely to be approved upon first examination. The explanatory matter can be put in the final report which accompanies the feel bill. When local counsel receives a request from home office counsel for more information about a bill or perhaps a suggestion that the bill is on the high side, he should recognize that he has failed to sustain the burden of proof. If there is anything further to be said in support of the bill it should be said promptly, and if on review the charge seems to be high it ought to be cut down without argument. Some local counsel bill according to one fee schedule for favored insurance company clients and according to another fee schedule for others. I think this is a mistake. Local counsel should think of themselves as representing the insurance industry.

Litigation has become increasingly expensive, so expensive that the insurance companies are actively studying every alternative. I predict that the volume of litigation will be reduced by an important percentage because litigation has been priced out of the market, so to speak. Lawyers fees have gone up steadily just as has everything else and this is as it should be provided fee bills are in line with the reasonable value of professional services. However, I have seen more fee bills which are out of line in the last few years than ever before. I want to make the point that the insurance companies are becoming price conscious. Fee bills are being scrutinized as never before. There is no excuse for looseness in the valuation of professional services. Lawyers who pick good round sums out of the air when making up a fee bill are in danger of losing insurance clients. There is already a noticeable trend

from expensive to less expensive local counsel.

The congestion of the trial calendars in the courts in metropolitan areas has been very costly to the insurance companies. Contrary to popular impression the insurance companies do not benefit by long delays between the commencement of the suit and its trial. For the last decade this country has suffered severely from inflation, and although it may not have occurred to most of my readers, one of the most expensive aspects of inflation, so far as the insurance companies are concerned, is the steady increase in value while they are awaiting trial of suits in which unliquidated damages are sought. These cases are delayed in the courts for a year or two years or even longer so that the ultimate extra cost to the insurance companies can be measured in many millions of dollars. Local counsel can be of great service by actively supporting reforms in the administration of the courts generally and in the handling of trial calendars particularly. They might well study what has been done in New Jersey where Mr. Chief Justice Vanderbilt has completely eliminated congestion in the trial calendars.

Local counsel who is not reliable on the law of his own state can hardly expect to have the complete confidence of home office counsel. All too frequently home office counsel must do legal research that should have been done by local counsel. You will be reluctant to believe how often home office counsel is in a position where he must set local counsel straight on the law. This is no field in which to play by ear.

My observations and suggestions are not intended to be critical. They are needed by only the few. Speaking generally, local counsel has done a grand job for the insurance companies. Insurance litigation has been handled smoothly, efficiently and for the most part successfully by local counsel from coast to coast. No one knows better than home office counsel that the Insurance Bar is comprised of the best lawyers in each community. There is no lack of appreciation of the debt which the insurance companies owe to local counsel.

MODERATOR DODD: Thank you, Frank, for a very frank and very interesting paper.

Now, under the title of "Trial Counsel Makes Some More or Less Random Observations on Home Office Counsel," we will hear some rebuttal from Mr. Pat Eager, of Jackson, Mississippi. (Applause)

MR. PAT H. EAGER, JR. (Jackson, Mississippi): Mr. Chairman and Ladies and Gentlemen, I want first to express my appreciation to Mr. Van Orman for those closing complimentary remarks to the laborers in the field.

Home Office Counsel As Local Counsel Sees Him

PAT H. EAGER, JR.
Jackson, Mississippi

AT the outset, and on behalf of local trial counsel, I want to say to Mr. Van Orman that the trial lawyers of this Association appreciate very highly his complimentary remarks and his sincere approach to the subject under discussion.

A couple of years ago I received a long distance telephone call from the newly elected President of the Mississippi State Bar, requesting me to serve as Chairman of the committee on raising the standards for admission to the Bar. I immediately told the President, who was and is my good and personal friend, that he evidently was laboring under a misapprehension, because I, myself, had neither previous to nor during my thirty-five years of alleged practice of the law even so much as entered the inside of any law school. He promptly replied that evidently I didn't catch the point; and thereupon I really did catch the point, and so I told him I would be the guinea pig!

A couple of months or so ago my good friend, Chairman Lester Dodd, wrote me and requested me to participate in this forum on behalf of and in defense of the lowly and meek local trial counsel. Reluctantly I agreed to again be the guinea pig. The last case I successfully defended was in the early part of the twentieth century, and the only reason it wasn't in the latter

part of the nineteenth century was simply because that was a little too early in my professional career.

Getting down to the subject before us, and in an effort not to consume more than my allotted time, I wish to direct your attention to certain definitions for use in connection with the submission of this symposium.

Unless the context otherwise requires, the definitions which follow govern the construction and meaning of the words and terms used in this paper:

(1) Res ipsa loquitur: "The Thing" speaks for itself—is Home Office counsel; and for brevity, but with due deference, we will hereafter refer to him as HOC.

(2) Moron, Nitwit and Plughead: all synonymous and used interchangeable, but each meaning the same object, to-wit: Local trial counsel.

(3) Directed Verdict for Defendant: That which local trial counsel prays for and HOC pays for!

(4) Tort: Latin term meaning "You done me wrong, now pay me."

(5) Proximate Cause: In olden days recognized by the courts as a logical application of cause and effect—however, now obsolete.

(6) Measure of Damages: Policy limits plus cost of defense, and more than likely excess judgment.

(7) Harvard Classics: Series of lectures emanating from HOC to Plughead in re: how simple the case is, how easily it can be successfully defended and with little effort on the part of Plughead and little pay in return.

(8) The Theory of Relativity: The one I refer to is not Einstein's but that of HOC, to-wit: His construction thereof, meaning that the more work and time Plughead puts in on the case it is relatively of no concern in calculating his compensation, which is solely governed by the law of diminishing returns.

(9) Pandemonium delirium: Plughead's condition when fee check finally comes in.

(10) Gratitude, minor: Transmittal letter with fee draft consisting of one short sentence saying so.

(11) Gratitude, major: Same except additional sentence reluctantly expressing appreciation for Plughead's hard and unsuccessful battle.

(12) Gratitude, minus: Blank envelope with fee draft inside.

(13) Nightmare: Plughead's dream when the case is finally concluded. His dream: "I wonder who's kissing him now."

It has been said that lawyers' fees and litigation have become so increasingly expensive that the insurance companies can no longer afford either. He, for whom I indirectly have the honor to be named, long years ago, before the Virginia Assembly, in speaking of chains and slavery, remarked that as for others he knew not what they would choose, but as for him it was either liberty or death. As for this one lawyer, and speaking for him alone in rebuttal to such contention, I desire to say that for several years I have been considering the alternative of getting out of the first line trenches and climbing into the limousine of the plaintiff's lawyer. Such a contention has an appeal from both ends of the line.

These discussions usually seem to center around the question of what constitutes a reasonable and an unreasonable fee. Some of our HOC friends contend that the burden of proof is on the lawyer to sustain his fee bill by a clear preponderance of the evidence, except perchance a minority of the group, who contend that it should be beyond every reasonable doubt—and I mean beyond!

One of the great advantages which I fell heir to, not ever having attended law school, was to discover right at the beginning of my career as a defense lawyer, that the burden of proof has been, now, and always will be, on the defendant. He who contends to the contrary will learn by paying off the verdict.

HOC cheerfully agrees that he wants to pay a reasonable fee to local trial counsel. Local trial counsel will be more than grateful to receive what he conceives to be even a reasonable fee. The difficulty seems to be in the method of calculation adopted by the respective parties. HOC usually contends that the amount involved, the skill and experience, if any, of local trial counsel, the reputation and standing, if any, which local trial counsel has through the years attained in his own community, are elements in no wise to be considered, but that generally speaking, it is a question of how much time and labor was wrought. I am willing to submit what the courts of the country have uniformly said in this respect, and briefly, *5 American Jurisprudence,* page 380 announces the

recognized rule, using in part the following language:

> "The determination of this depends largely upon the circumstances of the particular case. Among other things to be considered are the importance and results of the case, the difficulties thereof, the decree of professional skill and ability required and exercised, the skill, experience, and professional standing of the attorney, and the prominence or character of the parties, where it affects the importance of the litigation, as well as the amount or values involved or recovered."

While not exactly in point, nevertheless I am reminded of the very fine statement of Honorable Joseph C. Hutcheson, Jr., Chief Judge, United States Court of Appeals, Fifth Circuit, when, in speaking of the ideal Judge, he said:

> "If you ask me what is the prime requisite of the ideal judge, I must tell you that it is faith. If you ask me, faith in what, I must tell you faith in the natural law principles upon which our freedom depends, faith in the rights of man, faith in the constitution which declares and in the constitutional way of life which protects them, faith in law as liberator, faith in the justice of the general will, faith in the American way of life, faith, in short, in the principles and practices which in Madison's immortal phrase 'enable the government to control the governed, yet also oblige it to control itself.' "

What I am trying to tell you is that which you already well know, to-wit: That there are hundreds of judges and thousands of lawyers, but nevertheless there are judges and judges and lawyers and lawyers, and you know what I mean.

Unquestionably the cost of writing business and Home Office and field operational costs have greatly increased in recent years, not to mention the liberality of not only the juries but the courts in constantly sliding the decimal point to the right. However, HOC must remember that local trial counsel's expenses in like manner have greatly increased, and if you refer to *143 A. L. R. 721,* you will there find the cases annotated to the effect that the overhead expenses of attorneys in maintaining their offices are to be taken into consideration in determining the value of their services and in fixing their fees therefor. There are many law firms practicing today, whose monthly overhead is as much or more than the gross fee receipts were fifteen or twenty years ago. Not long ago a client raised some question about a $4,000.00 fee for services rendered for the executor in a substantially valuable estate. I told him just to let me show him some figures and whatever he said was all right with me. I then took pencil in hand and took the $4,000.00 as a base fee, deducted 30 per cent overhead expenses based on actual experience, allotted my portion of the remaining balance to myself, deducted the appropriate sum for the Collector of Internal Revenue, and likewise the Income Tax Department of the State of Mississippi, and arrived at the final net fee so far as my pocket was concerned of a little less than $400.00. The client's only comment was, "Give me a blank check." Twenty years ago the same $4,000.00 fee would have resulted in a net $1,000.00 in my pocket—in fact, at that time a $2,000.00 fee yielded more net than a $4,000.00 fee today. It is self-evident that a busy law firm must do a tremendous gross volume in order for the participating members to have only a reasonable living left over. There may be lawyers in the East and other metropolitan centers that get rich practicing law, but I can truthfully say that among the busy firms in my section, no lawyer has gotten rich practicing law—several have become reasonably independent financially, but it was by virtue of investments and risks wholly outside of his profession, and which reminds me that Joe Louis in only thirteen years earned over four million dollars, and the race horse, Citation, in some three years earned for his owner $938,000.00.

For many years I have adopted the policy, when it comes to sending in the fee bill and the letter of transmittal, to frankly state to client that fee bill is enclosed and if entirely satisfactory kindly let check come forward promptly—if not, send check anyway! I believe in a spirit of cooperation, and such conduct affords trial counsel ample protection, and at the same time enable HOC to pay and pay promptly, and either with or without prejudice.

I told you that it has been many years ago that I successfully defended my last jury case. I was so elated that I sent what I considered to be a very gleeful, but apparently ambiguous, telegram to HOC, whom I personally knew. He wired back in effect to cut out the poetry and advise what the verdict was. I promptly replied, "Not one cent for tribute, but one thousand bucks for defense. Kindly let check come forward promptly." After about three or four weeks wrangling back and forth by correspondence, I will say to his credit that he paid the fee, but if you had read the final letter enclosing the draft you would have felt like the company's surplus had been wiped out and the capital greatly impaired.

Speaking a little more seriously, this matter of fixing trial counsel's fee, and fixing it on a fair and reasonable basis, is largely a practical matter, and for which no definite yardstick or other measurement exists. In our office we keep a complete detailed statement of all production by the respective members of the firm, together with a detailed expense account, and each month I receive a report accordingly. We have four participating partners and two fine associates—all secretaries and stenographers must and do meet three essential requirements: Pulchritude, Proficiency, and Pleasing Personality. I have taken the years 1949 and 1950 in my own firm's office, and in the year 1950 I personally handled 90 separate matters under the head of insurance practice. The fees received from these 90 insurance matters totalled just a fraction more than 50 per cent of my total personal production. Conservatively, 75 per cent of my time is devoted to insurance practice, and with reference to litigated cases, I think I can safely say 85 to 90 per cent of my time is strictly insurance practice. Nevertheless, of total fees produced by me personally, only 50 per cent found its source in insurance practice. Of the 90 matters handled in 1950, fees received in six cases aggregated 50 per cent of the total fees for the 90 cases. I mention this last proposition because it demonstrates the large majority of cases that the average insurance lawyer in my section handles, and where the compensation is in no wise in keeping even with the time and work devoted thereto. I accept it as a part of the normal practice, and in no wise intend my remarks as criticism in this respect.

In the year 1949, for my firm, I personally handled 75 insurance matters, and fees received amounted to 39 per cent of my total personal production of all business. The element of time and the percentage of litigated jury cases was comparable to that above stated for the following year, but 39 per cent of my 1949 total production was substantially the same in dollars and cents as the 50 per cent of total production of 1950.

In this connection, just to mention one matter, and I say this in perfect sincerity and frankness, HOC is here today at the expense of the Home Office. The expenses of local trial counsel and his wife, and such members of his family as he has brought along, emanate but from one source. Particularly for those of us who live some distance from the scene of operations, attendance at this and the American Bar convention is a highly recurring financial expense. Some of you gentlemen situated more closely to the scene of operations can attend at a much lesser expense. I immediately add that I am the recipient of value received and many fold. The contact with the many fine friends in this association, and the advantages of our various meetings and forums, has far outweighed any personal expense to me, but nevertheless, it is a highly substantial item of expense to the local trial counsel.

Certainly, I am in no position to tell Home Office counsel how to run his business. Goodness knows I have difficulty enough making a mess of my own, but at the same time after over thirty-five years fairly active practice, and 75 to 85 per cent of it, so far as litigation is concerned, in connection with insurance practce and on the defense side of the docket, there are certain matters that occur to me, and which I will now only briefly mention, and without elaboration.

(1) It has been said that we will likely see changes in legal representation, which reflect a trend from expensive to less expensive local counsel, and that younger counsel on the way up will receive more cases than heretofore. My comment is certainly without the slightest reflection on this trend, although it seems to be motivated primarily on the basis of obtaining less expensive local counsel. If that is the sole motive, I think the con-

clusion will demonstrate that the major premise is fallacious. Nothing pleases me more than to see competent young counsel really on the way up receive their just share of the practice, and it has been my privilege to demonstrate that belief by urging in this Association that we constantly be sure to invite younger capable insurance attorneys into this organization. If the matter involved is a matter of importance, and without any personal motive whatsoever, I still believe it would be a mistake to send a boy to mill without at least letting papa go along to hold his hand.

(2) Something has been said to the effect that it is not necessary to refer a file even in an important case, to local trial counsel until the adjuster has completed his investigation and made recommendations and settlement efforts have failed, but the trouble is, as a practical matter, that too many times this results in such delay that local trial counsel does not have ample time in which to analyze the case fully, call for such additional material investigation as is necessary, and advise client. Since the new Federal Court rules were adopted, I have many times had the file reach me after suit had been filed and when the twenty days was up and it was too late to remove to Federal Court, if one is so optimistic today as to seek that sanctorium. Personally, where a serious case is involved, I think the company would benefit by instructing the adjuster to contact and get the additional help and advice of local counsel right from the start. I have had this very experience many times and it has worked to the mutual advantage of the adjuster, local counsel, and the Home Office.

(3) It has been said that there is some doubt that there is any relationship worthy of the name between Home Office counsel and local counsel. I respectfully disagree with that comment 100 per cent, and my statement is based on my own personal experience and not speculation. Among the purposes of this Association is, "To bring into close contact by association and communication lawyers . . . actively engaged in practice of the law pertaining to the business of insurance and to insurance companies;" and not only for the purpose of becoming more efficient, but "to better protect and promote the interests of insurance companies," and last but not least, "to encouarge cordial intercourse among such lawyers . . . and between them and insurance companies generally." The insurance companies here are represented by Home Office counsel. When I was honored with membership in this Association some eighteen years ago, and I have attended every annual convention except one, I came here with no desire to endeavor to obtain any law business, but rather to become acquainted with those insurance company clients and their Home Office counsel and their legal staff with whom I was then dealing and would deal with in the future. The personal acquaintanceship, I think I can safely say, and without any presumption on my part, has been highly mutually beneficial to us both. Some HOC promptly discovered they had made a mistake, others sympathetically stayed with me hoping for the best. God bless each one of them!

(4) The adjuster plays a highly important part in the insurance business. Like the local trial counsel, he does not claim to be perfect. My observation is that some good adjusters have been ruined by taking a short law course and getting a license to practice law. I notice the change in their letters to the Home Office after that. They cite decisions and quote from text books, the source of which usually is a copy of a brief in some other somewhat similar case, and which they have obtained from local counsel, but too often they overlook the wholly inapplicability of the particular legal principle to the case in hand. I frankly tell my adjuster friends to lay off attempting to write opinions on liability or non-liability, but give me and the Home Office a factual investigation, and those charged with the responsibility of arriving at a legal conclusion will discharge that obligation.

Ordinarily, and in the absence of an emergency, if I were a Home Office counsel I would be slow to leave up to an adjuster selection of trial counsel. We are at least partly human, and the personal element ought to be out of the way both from the standpoint of the adjuster, as well as local counsel.

After all, what effect something will have on one individual may have just the opposite effect on the other. Will Rogers used to enjoy telling his audience about the marvelous joys of the wonderful mineral waters of his home town of Claremore,

Oklahoma, and he said that William Jennings Bryan once visited Claremore and took one drink of this mineral water and it turned him against liquor, and a few years later on Senator LaFollette visited Claremore and took two drinks of this mineral water and it turned him against the world.

(5) It would be mighty fine if we could swap our hindsight for our foresight. It is mighty easy to criticize local counsel when he has first suggested a smaller settlement value, or even recommended going to trial, and later on in the light of further developments changes, or may even reverse his position entirely. The cases are indeed rare where there is not a vast distinction between the original investigation file and the final record as made up by the Court reporter, but even if trial counsel was in error in his first opinion, I think it would be much better to adopt his latter and more considered opinion than otherwise. If courts of last resort occasionally sustain petitions for rehearings and reverse their solemn and freshly pronounced adjudications, then local counsel should not be handled too roughly for making a mistake occasionally either of the head or the heart. There is a vast distinction between a prudent, if somewhat delayed, settlement for $10,000.00 as compared to the jury sliding the decimal point one notch further to the east!

In conclusion I just want to say that practicing insurance law where I practice it, and I don't think there is much difference in one part of the country over the other, is a hard and difficult and arduous task. Most of our insurance cases are what we commonly call damage suits. When the case is called by the trial judge, sympathy begins for the plaintiff from the judge down through the officers of the court and on into the jury box. Everybody knows it is a suit for damages not against some individual or corporate defendant, but against some insurance company! Don't tell me the burden of proof is on the plaintiff. Not so long ago the trial Judge had granted me every requested instruction except one, and when he marked the last instruction "given" as we do in Mississippi, he said, "Now, have you got any other request?" and I said, "Judge, only one more," and he said, "What is it?" I replied, "Pray without ceasing." Experience has taught me that one of two alternatives face us—"Pray or pay."

The work of the trial lawyer is, indeed, hard, difficult and arduous. After many, many tough fights, and with the battle scars still visible on his body, at times he feels like the oldest son in the family after Pa had passed on to his eternal reward, and after the funeral he called his brothers and sisters together and said that they were going to amicably divide up the farm and little estate without wasting one dime on the lawyers, and to which all cheerfully agreed. A few days later, in the process of consummating this worthy project, the youngest of the boys, looking at the plat of the farm and his allotted area, began bucking and said he didn't have any idea taking his share of the land in a bunch of gullies and washed out hollows, and the net result was that he got a lawyer, and it wasn't long before each had his respective lawyer. After about two years wrangling, it appeared that the lawyers got them ready for final settlement, and about that time another of the children began bucking and then it was that the eldest son got up and said, "We have had so much trouble and so much wrangling over the estate that sometimes I almost wish Pa hadn't died!" My hat is off to the capable, hardworking, sincere and devoted trial lawyer, who, against great odds, does what I consider a mighty good job.

MODERATOR DODD: Thank you, Pat, for an equally frank presentation of the other side of this situation.

We are going to trespass for a few minutes on the time of the Forum that is to follow, because I am quite sure that a few of you may have some questions that you would like to put to either or both of these gentlemen, and while we are somewhat late in our proceedings today I believe that you would prefer to take a few minutes out of the time yet remaining to us for some discussion. Anyone who wishes to start this discussion by asking a question of either of the gentlemen, will you please in so doing give us your name and your home location? Are there any questions?

MR. RICHARD W. GALIHER (Washington, D. C.): I would like to ask Mr. Van Orman a question. I do not know what the policy of your company is with respect to settlement negotiations. Some companies that I represent in Washington

prefer their local claims office to handle settlement negotiations, explaining to me that that is a nation-wide policy which they follow. Other companies much prefer local trial counsel to handle all of their settlement negotiations. It is a subject of great concern to me and I would like to know what your observation is with respect to that and I would like to know what some of the other gentlemen here on the floor think of it.

MR. VAN ORMAN: In the first place, there is not any uniform practice. It is a matter of fielder's choice between companies, and I am quite sure that each company uses both systems, depending upon the location and particularly depending upon the individuals involved. I do not want to be put in the position of trying to prove this, but a lot of insurance people feel that not all lawyers are good adjusters, not by a long shot. My personal feeling is that Local Counsel by and large are good adjusters, but that is an awful hard bill of goods to sell in some insurance headquarters. Now, where a company is being operated by officials who feel that by and large lawyers are not good adjusters, you can understand that the authority to adjust would be almost certainly left with the local adjuster or claims office. On the other hand, when Home Office Counsel have great confidence in the negotiating ability and evaluating judgment of Local Counsel, I think you will find that in many locations where Local Counsel justifies that belief, Local Counsel will be given the ball on settlement. I do not think that one can generalize and say that either system is the correct system. I think it depends upon factors to be considered in each relationship and in each location.

MR. RAYMOND N. CAVERLY (New York, New York): Mr. Eager, I would like to ask you this question: What are the home offices to do when they get a bill from a lawyer that is obviously too high—cut the bill, or fire the lawyer?

MR. EAGER: Pay the bill! (Laughter)

MODERATOR DODD: Does any other HOC have the nerve to ask Mr. Eager a question?

Mr. Eager suggests that Mr. Caverly might better improve his time by getting his putter and going down to the green. (Laughter)

MODERATOR DODD: I am afraid our talent is too formidable here. No one seems to dare to ask them any questions.

MR. STANLEY M. BURNS (Dover, New Hampshire): Speaking about bills, what does the home office think of paying counsel approximately $100 a day for being in court for several days and assuming the responsibility of the trial and then having an expert come in to testify and be put on the stand an hour and pay him $150?

MODERATOR DODD: I think that is for Mr. Van Orman.

MR. VAN ORMAN: I was just thinking that I do not know how to answer that, but Mr. Eager says he can answer it.

MR. EAGER: Who the hell do you work for only $100 a day? (Applause) (Laughter).

MODERATOR DODD: These fellows in New Hampshire may have a little trouble with the union.

Are there any further questions?

MR. J. RALPH DYKES (New York, New York): I would suggest that my friend Eager spend a year running a home office legal department.

MODERATOR DODD: I am quite sure Pat could do a very excellent job of it.

MR. EAGER: I would straighten the thing out; I will tell you that. (Laughter) If I was going to run that home office, Mr. Dykes, I would operate on your board of directors just like I am trying to operate on HOC now. I would get myself lined up first and then see how the thing ran.

MODERATOR DODD: Ladies and Gentlemen, I am sure it has been a very interesting and pleasant morning. We have run slightly over our time. There is another forum to follow, a very interesting forum. Just before we get into that I think Mr. Stichter has an announcement to make.

PRESIDENT STICHTER: I wish to repeat the announcement I made earlier. There are many more here now than when I spoke before. Yesterday the Nominating Committee met in the Chesapeake Room down by the liquor club. Today it will be meeting in the Washington and Lee Room, which is just across from the Old White Club. The Nominating Committee is now in session and will remain in session until 12 noon. It will meet again at 8 o'clock tonight and be in session until 10. You are urged to see the committee early if

you have any suggestions to make to the Nominating Committee.

Thank you.

MODERATOR DODD: Ladies and Gentlemen, we have had a very interesting and very pleasant and very instructive discussion, and I want to thank both Mr. Eager and Mr. Van Orman for their part in it. A very interesting forum is to follow, and I will ask at this time that Mr. Kristeller, the Vice-Chairman of the Open Forum Committee, take over and let you know what that is about.

MR. JOHN H. ANDERSON, JR. (Raleigh, North Carolina): With reference to the golf tournament, we regret very much that our good friend Jimmy Donovan is unable to be present with us at the Convention due to the serious illness of his mother. However, Jim has done a magnificent job of purchasing and selecting prizes. We have something over thirty very fine prizes to be distributed to the winners of low nets and low gross. I have been asked to make this announcement by the Vice-Chairman of the Committee. The net scores will be computed on the basis we used last year, which is an automatic handicapping system. The tournament will begin this afternoon. You will go to the Casino and get your foursome lined up as you please. All those who do not have foursomes already arranged might very well arrange to fit into a foursome if you will report to the Pro down there and tell him when you arrive that you are available. There will be a one-stroke penalty for difference between the Greenbrier and Old White Courses in figuring the low gross scores only. Of course it will make no difference which you play when you are figuring net scores. You may play either course. There will be a golf ball given to each foursome for the longest drive on the first hole and another little souvenir.

In addition to the regular merchandise prizes which will be distributed, Mr. Charlie King has very generously donated a silver cup which you will see in the room downstairs right off the registration lobby. The golf prizes are there, too. That cup will be given to the winner of the low gross and it will remain in the possession of that winner for one year and he will return it next year and it will be passed on down to succeeding good golfers for the rest of the years as long as the cup lasts. I think it is a silver cup.

Gentlemen, I hope you will all go down and play the fine courses and each win a prize. (Applause)

MR. LIONEL P. KRISTELLER (Newark, New Jersey): After the repartee of the last forum, I have the extreme pleasure of presenting the Moderator of the next forum on "Government Tax Claims Under Contract Bonds and Government Lien Rights."

I am sure that you are going to get a very instructive discussion and I am pleased at this time to introduce on behalf of the Open Forum Committee Mr. Walter A. Mansfield, of Detroit, Michigan, who will act as Moderator. Mr. Mansfield. (Applause)

OPEN FORUM

24th Annual Meeting of International Association of Insurance Counsel

Fidelity and Surety Law Committee

Chairman: WALTER A. MANSFIELD
Detroit, Michigan

Subject: GOVERNMENT TAX CLAIMS UNDER CONTRACT BONDS AND GOVERNMENT LIEN RIGHTS

MODERATOR WALTER A. MANSFIELD (Detroit, Michigan): Ladies and Gentlemen, I know that the air is washed and the greens and fairways have been washed, and I am told the rough has been softened. We will probably find about that sooner or later. I am not going to take a great deal of time here this morning in my opening remarks. We have a subject which we feel is of intense interest to the surety industry and to attorneys who have occasion to practice more or less frequently surety law.

We have two individuals for this topic. We have the government point of view and we have the surety company point of view, and when the question was considered as to whom it would be advisable to ask to present the government point of view we thought nothing better could be done than to present an expert, and accordingly we asked Mr. Edwin L. Fisher, of Washington, D. C., General Counsel to the Comptroller General of the United States. I take great pleasure in presenting him to you. I might also say that at the conclusion of this round table we have papers for distribution, of our talks. Mr. Fisher. (Applause)

The Government Point Of View

HONORABLE EDWIN L. FISHER
General Counsel, General Accounting Office
Washington, D. C.

THE subject of my discussion will be "The effect of Government claims and tax liens upon the rights of sureties under contract bonds." The matters I will discuss will be confined to the relation of the General Accounting Office to the subject matter. For that reason I believe it would be helpful to a better understanding of the problem to give you a brief picture of the background and purpose of the General Accounting Office, which is headed by the Comptroller General of the United States.

The General Accounting Office is the Government's auditor. It has the duty of examining the financial transactions of all branches of the Government to see that they were authorized and properly conducted. This function was created by the first Congress in 1789 and was at that time placed in the Treasury Department, where it remained until 1921. In that year Congress enacted the Budget and Accounting Act, 1921. This statute transferred the auditing function from the Treasury to the newly-created General Accounting Office. The General Accounting Office is a part of the legislative branch of the Government. Its strength lies in its independence from control by the Executive Branch. A few statistics will give you an idea of the volume of its business: During the fiscal year 1950 25,300,000 vouchers were audited; 318,000,200 checks were reconciled; 12,400 decisions were rendered to departments,

agencies, claimants, and others; 311,689 general claims were settled; and 685 reports were made to Congress and its committees. The General Accounting Office is one of the few agencies that not only pays its way but in addition makes a substantial contribution each year to the Treasury, Collections from 1941 through December 31, 1950, totalled $718,100,000. This money had been illegally or otherwise improperly paid out and it is a fair statement to say that little of it would have been recovered except for the General Accounting Office.

The most important functions of the General Accounting Office so far as our present subject is concerned are those relating to the settlement of claims and accounts. By an act passed in 1817, and carried forward in the Budget and Accounting Act, 1921 (31 U.S.C. 71) it is provided that:

"All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

And it is provided in 31 U.S.C. that the General Accounting Office shall superintend the recovery of all debts finally certified by it to be due the United States. Balances certified by the General Accounting Office, upon the settlement of public accounts, are final and conclusive upon the Executive Branch of the Government (31 U.S.C. 74). Thus, a claimant who is dissatisfied with the settlement of his claim by the General Accounting Office may obtain relief, if at all, only by resort to the Courts or to the Congress.

It should be emphasized here that not all claims are for settlement by the General Accounting Office. There are several types of claims wnich the Congress has placed within the exclusive jurisdiction of particular administrative agencies. Most claims based on internal revenue and social security legislation are settled by the administrative agencies responsible for carrying out the particular programs or laws. For example, the Treasury Department, not the General Accounting Office, determines tax liability or indebtedness. But once that determination is made the facilities of the General Accounting Office are available to assist in collection of the debt. On the other hand, in the case of default by a Government contractor, the General Accounting Office determines the legal effect thereof and the resulting indebtedness, if any, to the United States. And, of course, in the case of conflicting claimants to a fund in control of the Government, as stakeholder, the General Accounting Office must determine the relative rights of the claimants, or leave them to their remedies in the Courts. As a matter of fact, in such cases it is proper for the accounting officers to have the conflicting claims transmitted to the Court of Claims for a judicial determination of the matter, 28 U.S.C. 2510. That is precisely what was done in the Prairie State Bank case (164 U.S. 227), when the accounting officers were under the Treasury Department, and more recently by the General Accounting Office in the Hardin County Savings Bank case (65 F. Supp. 1017).

In the case of an indebtedness of a contractor reported to the General Accounting Office this is what happens procedurally: The General Accounting Office attempts collection either by making demand on the contractor for payment of the amount determined to be due, or by offset of other funds due the contractor but which are in the hands of the Government. This right of the Government to apply money in its hands, due a debtor, in satisfaction of the indebtedness has long been recognized. Gratiot v. United States, 15 Pet. 336, 370; McKnight v. United States, 98 U. S. 179, 186. In the event the indebtedness cannot be collected by either of these means, the matter may be referred to the Department of Justice for further attempts at collection. In the event it becomes necessary for the Department of Justice to bring suit, the conduct of the suit is the exclusive responsibility of that Department. The General Accounting Office is at liberty to make any recommendations it deems appropriate in such cases.

It has been suggested that my discussion present the Government's side of the problem. I suppose in specific cases one might say the Government has a side in the matter. But we in the General Accounting Office, in performing our statutory duty, do not consider that we represent either side—we act more in a quasi-judicial capacity, and the sole purpose of our action is to settle the case in accordance with what we believe to be the law. Actually, we

represent neither side but stand more in the character of a stakeholder. Practically, we wish to be convinced before we authorize the disbursement of public funds in settlement of a claim. The Courts have said that it not only is our right, but our duty, to refuse to allow claims where we have considerable doubt as to their validity, thus leaving the matter for decision by the Courts. Longwill v. United States, 17 C. Cls. 288; Charles v. United States, 19 C. Cls. 316.

And now we get to the legal aspects of the subject.

Under the provisions of the Miller Act of August 24, 1935, 49 Stat. 793, 40 U.S.C. 270a-d, before any contract in excess of $2,000 for the construction, alteration, or repair of any public building or public work is awarded, the contractor must furnish two surety bonds to the United States. One, the performance bond, protects the Government—to the extent of the penalty of the bond—against the contractor's failure to complete the contract work; the other, the payment bond, is for the protection of all persons supplying labor or material for the contract work. It is the surety's rights under these bonds with which this discussion is concerned.

At the outset it should be noted that claims by the United States on account of taxes or other debts owed to it by the contractor can successfully be asserted only against property or rights to property belonging to the taxpayer contractor. United States v. Winnett, 165 F. 2d 149; Karno-Smith Co. v. Maloney, 112 F. 2d 690. Federal tax liens do not arise from any inherent attribute of sovereignty, but are rights created specifically by statute. The statutes dealing with the lien are found in sections 3670 to 3679 of the Internal Revenue Code, and, as to estate and gift tax liens, in sections 827 and 1009 of the Code. Section 3670 makes the amount of any tax unpaid after demand a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to the tax debtor. The lien attaches to the interest of the taxpayer in property in the hands of third persons, such as moneys owed for services rendered, or a chose in action arising under a construction contract (Citizens State Bank v. Vidal, 114 F. 2d 380), and applies as well to property acquired by the tax debtor after the lien arises as that in existence theretofore (Glass City Bank v. United States, 326 U. S. 265). The lien arises when demand for payment of the tax is made, but relates back to the time the tax assessment list was received by the collector. Section 3671, Internal Revenue Code. Except in the case of estate and gift tax liens, which last for ten years, tne Federal tax lien is unenforceable after six years, unless suit has been brought, distraint proceedings instituted, or a waiver obtained from the taxpayer. The lien is effective against unsecured creditors of the taxpayer on the date of receipt of the assessment list by the collector, but as against purchasers, judgment creditors, pledgees, and mortgagees, the lien is not effective until properly recorded. Section 3672 (a) Internal Rev. Code. On the other hand, liens for estate and gift taxes arise from the time of death or donation, and do not require recordation for validity.

Considering the tax claim merely as a debt owed the Government, mention should be made of the priority accorded all debts due the United States by sections 3466 and 3467 Revised Statutes, 31 U.S.C. 191, 192, including taxes. Price v. United States, 269 U. S. 492. This statute is applicable, however, only in cases where the debtor's estate, either by reason of death, legal bankruptcy, or insolvency, has passed into the hands of an executor, administrator, assignee or other representative of the estate, and the priority cannot attach while the debtor continues as the owner in possession of his property. The priority granted is very broad in its scope, and, in non-bankruptcy proceedings such as an equity receivership, will take precedence even over wage claims, although under section 64 of the Bankruptcy Act, 11 U.S.C. 104, such claims precede tax and other claims of the United States. United States v. Emory, 314 U. S. 423. And, of course, in ordinary bankruptcy proceedings, claims for taxes take fourth priority.

With respect to proceedings before the General Accounting Office, it makes no difference in the surety's rights whether the Federal claims against the contract proceeds are tax claims or claims of some other nature. In either case, they are claims against the contractor, and if it be determined that there is money due the contractor from the United States, the Federal claims will be collected by set-off. The

General Accounting Office has the right and duty to deduct from amounts owed by the United States to a claimant "All set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever" which the Government has against the claimant. United States v. Munsey Trust Co., 332 U. S. 234, 240, citing the case of Cherry Cotton Mills, Inc. v. United States, 327 U. S. 536. In the situation we are discussing, the only money which may be found due the contractor, and hence the only property of the taxpayer against which the tax claims may be asserted, is the amount agreed to be paid by the Government for the contract work. Some few contracts do not provide for any payment to the contractor until the job is complete, but in the usual case provision is made for partial payments as the work progresses, with a ten percent deduction from each progress payment to be retained until completion of the entire contract. It is most often these retained percentages against which claims are made.

Of course, unless the contractor breaches his obligation as principal under either or both contract bonds, that is, unless he fails to perform the contract in accordance with its terms or fails to pay laborers or materialmen, no rights accrue to the surety under the bonds—except the right to collect, however difficult, the full bond premiums. If no breach of either bond occurs, the contractor's right to the entire contract price is clearly established, and in the absence of an assignment under the Assignment of Claims Act the Government may set off its tax or other claims against the amount due under the contract without complaint from anyone except the contractor. But if a breach occurs, it not only brings into consideration the rights of the surety, but may also diminish or destroy the contractor's rights to the contract proceeds, and thereby lessen or wipe out the only property right against which the tax claim may be asserted.

It is pertinent, therefore, before discussing the nature of the surety's rights and the effect of the tax claim upon such rights, to consider what effect a breach of the payment or performance bond by the contractor has upon his rights. What happens if the contractor completes the contract work satisfactorily and on time, but fails to pay for all labor or material used in the work? The unpaid laborers and materialmen themselves have no lien on the public work constructed, nor do they have any right to payment from the United States. Equitable Surety Co. v. McMillan, 234 U.S. 448, 456; Schmoll v. United States, 105 C. Cls. 415, 455, 63 F. Supp. 753, 757. While the Supreme Court in the Munsey Trust Company case expressly declined to decide whether unpaid laborers and materialmen would have any claim to retained percentages under a contract, it indicated rather strongly that the contractor's right to the retained percentages, once the contract was completed, would prevail over claims by laborers and materialmen, and this is the rule followed by the General Accounting Office. If the surety pays such claims, it is subrogated to the rights of the laborers and materialmen, but, as stated, they have no enforceable rights against the contract fund itself, at least as long as the fund is still in the hands of the Government, and if there are Federal tax or other claims against the contractor, they will take priority over these rights of the surety so long as the Munsey case remains the law. So far as concerns the right of the Government to collect its tax claim by set-off, therefore, the contractor's property right in the contract proceeds is not affected by his failure to pay laborers or materialmen.

But suppose the contractor fails to make satisfactory progress with the contract work itself. In such case, his right to proceed with the work may be terminated by the Government. Under a progress payment contract, the unpaid contract balance then in the hands of the Government may be classified as follows: First, there is the so-called "unearned" balance, consisting of the amount payable for the work remaining unperformed at the time of default. Second, there are the retained percentages, consisting of amounts withheld from progress payments previously made to the contractor for the completed part of the work. Last, there is often still in the hands of the Government the progress payment covering work performed immediately prior to the default. Upon termination or abandonment of his right to continue with the work, the contractor thereby loses all rights to the unearned contract balance, regardless of whether the work is ever finished or whether it is finished for less than the unearned balance. The contractor's default

in performance operates to forfeit his rights to this part of the contract balance, although it is available and must be used by the Government against the cost of completion and other damages occasioned by the contractor's default before the rest of the contract moneys may be resorted to. The retained percentages, it consistently has been held, are security to the Government for the faithful completion of the work, and are available to pay the cost of completion and other damages attributable to the contractor's failure to perform. Prairie State Bank v. United States, 164 U. S. 227; United States v. Munsey Trust Co., *supra*. It has also been held that the Government may use any earned but unpaid progress estimates to satisfy its default damages. Modern Industrial Bank v. United States, 101 C. Cls. 808. Consequently, in a case where the damages occasioned the Government by the contractor's default, that is, completion costs, delay damages, and the like, are in excess of the balance of the contract price in its hands, the contractor's right to any part of such balance is extinguished, and there is no property of the contractor out of which the tax claim may be satisfied. However, to the extent that the funds in the hands of the Government exceed its damages, the retained percentages and earned but unpaid progress estimates are payable to the contractor or to those claiming through him, and are, therefore, property rights against which the tax claim may be asserted, in the absence of a superior right thereto by the surety or an assignee.

Coming now to the nature of the surety's rights under the contract bonds, there is, of course, the fact that no enforceable rights accrue to the surety until it is put to some expense because of the contractor's breach of either the payment or performance bond. Payment by the surety gives it the following rights. First, by reason of the suretyship relationship itself, there is an implied agreement on the part of the contractor to indemnify the surety against any loss it may suffer by reason of the contractor's breach. Second, the surety usually holds an assignment from the contractor, effective in the event of his breach, to so much of the contract proceeds as may be necessary to reimburse the surety for its expenditures under the bonds. Third, and also arising as an incident of the suretyship relationship, the surety is subrogated to the contractor's rights against the Government to the extent it fulfills the contractor's obligations, to the rights of laborers and materialmen if it pays all such claims, and if it makes good all damages occasioned by the contractor's default in performance, the surety is subrogated to the rights of the United States in the contract proceeds to the extent necessary for its reimbursement.

These rights of the surety may be asserted in various proceedings, either before the contracting agency involved, the General Accounting Office, or the courts, or in suits against the contractor in state or Federal courts, including bankruptcy and receivership actions. Ordinarily, the only cases which come before the General Accounting Office are those where part or all of the contract price is still in the possession of the Government. Also, since the collection of Federal taxes is usually undertaken by the Bureau of Internal Revenue itself, it is only in cases where the contractor taxpayer has a claim against the United States that his tax indebtedness is referred to the General Accounting Office for possible collection by set-oft.

The rights derived by the surety under the implied agreement of indemnity between itself and the contractor are not enforceable against the United States, and cannot be recognized as a valid claim against any contract proceeds in the hands of the Government, even in the absence of a Federal claim against the contractor. Nor is the assignment of the contract proceeds to the surety valid as against the United States because of the prohibition contained in Section 3477 Revised Statutes, 31 U.S.C. 203, against the assignment of claims against the United States. Martin v. National Surety Co., 300 U. S. 588; United States v. Munsey Trust Co., *supra*, note 1, p. 237.

This leaves for consideration only those rights which the surety may derive by subrogation. Such rights are equitable in nature, and may be defeated for equitable reasons on the facts of the particular case. River Junction v. Maryland Casualty Co., 110 F. 2d 278, cert. denied 310 U.S. 634, and 133 F. 2d 57. Thus, it avails the surety nothing to be subrogated to the rights of the contractor in the contract proceeds, when there is a Federal claim, since such rights must yield to the Federal tax claim,

or indeed, to any other claims of the United States against the contractor. United States v. Munsey Trust Co., *supra.*

The surety is also subrogated to the rights of laborers and materialmen upon payment of their claims. These particular derivative rights of the surety have, perhaps, been productive of more litigation than any of its other rights under the bonds. Since the subject under discussion presupposes the existence of a Federal tax or other claim against the contractor, the Munsey Trust Company case is decisive of the Government's right to collect the tax debt by set-off from the contract proceeds, even though the soundness of that decision may not be conceded by all here present. In that connection, the case of Royal Indemnity Co. v. United States, decided last November by the Court of Claims, 93 F. Supp. 891, appears to find some rights in the contract proceeds on the part of laborers and materialmen under the Henningsen and Belknap cases, 208 U. S. 404 and 271 F. 144, which when acquired by a surety through subrogation are sufficient to defeat an assignee bank's right to the fund. For some reason, the bank did not apply for certiorari in that case.

This case raises an interesting question. The Assignment of Claims Act of 1940, as amended by Public Law 30, 82nd Congress, approved May 15, 1951, prohibits set-off or withholding by the Government from the assigned contract proceeds on account of any tax indebtedness of the contractor in cases where the contract contains a "no set-off" clause. If the proceeds of such a contract have been assigned to a bank pursuant to the Act, the Government would be required, in the absence of a claim by the surety at least, to pay the entire proceeds to the bank upon completion of the contract, even though none of the bank's money went into the contract work, and the contractor owed Federal taxes. On the other hand, if there were no tax claim, the surety who had paid laborers and materialmen would prevail over the bank under the Royal Indemnity Company holding. Indeed, even the Coconut Grove Exchange Bank case, 149 F. 2d 73, suggests the possibility that the surety might prevail over an assignee bank whose money was not used in the contract work. Under the statute, then, the assignee's claim is superior to the tax claim; under the Royal Indemnity case the surety's claim is superior to the assignee's claim; and under the Munsey Trust case the tax claim is superior to the surety's claim. You will notice that the surety is in the middle—of the foregoing chain of priorities, that is.

Of course, no such cases have yet arisen under the recent amendment to the Assignment of Claims Act. When one does I think we can be assured of litigation. A good argument could be made that the Government could not withhold unpaid contract moneys, on account of a debt, to the extent of an assignee's interest therein. If that be assumed as a matter of law then it seems to me that the resulting fight would be between the assignee and the surety. If, then, the principles of the Royal Indemnity case applied, the surety would prevail to the extent of its interest. In that event, the assignment for once would have operated to the surety's advantage.

We come now to the surety's right to be subrogated to the rights of the United States against the contract proceeds. As has been stated, this right accrues to the surety only when the contractor has failed to perform the contract work, and the surety has made good his default. The rule generally stated with respect to a completing surety's right to contract funds in the hands of the owner which have been earned by the contractor prior to default is that upon completion of the contract the surety is entitled to be subrogated to all rights which the owner could have asserted against such funds upon default by the contractor. Prairie State Bank v. United States, supra. Of course, all damages sustained by the owner by reason of the contractor's default must first be satisfied, since there can be no subrogation to the rights of a creditor until the debt has been paid in full. United States v. National Surety Co., 254 U. S. 73. Nor is the surety entitled to anything more than reimbursement for its reasonable and necessary expenses in fulfilling its principal's obligation. We have discussed the rights which the Government has against contract funds in its hands, and have seen that its right to apply the unearned contract balance and the retained percentages against its damages resulting from the contractor's default in performance is unquestioned. It also seems obvious that a contractor who had defaulted, or his assignee, could not compel

payment by the Government of progress estimates earned prior to default to the extent the other contract funds in the hands of the Government were insufficient to take care of the damages flowing from the default. Modern Industrial Bank v. United States, supra. However, when these rights of the Government devolve through subrogation upon the surety, their enforcement becomes subject to equitable considerations, and the surety's claims may be defeated by the equities of the particular case. The conflicting claims in such cases have most frequently been asserted by sureties and assignees of the contract proceeds. As between these two the surety's claim has nearly always prevailed as to the retained percentages, and usually as to other moneys earned by the contractor prior to default. The retained percentages, for example, have been said to be as much for the indemnity of the surety as for the security of the one for whom the work is to be performed, and the completing surety's claim for reimbursement therefrom has been held to be prior in time and superior in right to the claims of an assignee bank. Prairie State Bank v. United States, supra. However, this case and the other cases which follow it involve only the relative equities between the surety and an assignee or other party, not between the surety and the owner.

The leading case involving a conflict between claims of the owner and of the surety as subrogee is, of course, the Munsey case. But the surety's rights in that case derived solely by reason of its payment of laborers and materialmen's claims, and the court held, in effect, that under such circumstances there were no rights of the United States to which the surety could be subrogated. This is not true where the surety takes over and completes the contract work upon its principal's default in performance. In such case, admittedly there are rights of the United States to which the surety becomes subrogated. The question then arises whether these equitable rights derived by subrogation will prevail over other rights the Government has against the contractor arising out of independent transactions, such as the right of set-off for tax or other debts.

The precise point appears to have been determined judicially in only one case, Standard Accident Insurance Company, Inc. v. United States, decided June 5, 1951, by the Court of Claims. It was argued by the surety in that case that the Munsey Trust case did not expressly or by implication overrule the line of decisions beginning with the Prairie State Bank case which hold that retained percentages are as much for the indemnity of the surety as for the security of the Government; that such percentages are dedicated to the fulfillment of the contract; and that since the surety by completing the work reduced the damage to the Government, it was entitled to reimbursement out of the dedicated and retained percentage of the contract price. The argument made is not unlike the reasoning in the case of Scarsdale Nat. Bank & T. Co. v. United States Fid. & Guar. Co., 264 N.Y. 159, 190 N.E. 330, which involved conflicting claims by an assignee and surety, and in which the court stated:

"• • • the moneys due at the time of the default, called the earned moneys, could and would be applied by the state in reducing the amount due on the defendant's bond.

"Does it make any difference in the application of these earned moneys that the surety company complied with the demand of the state and completed the job at its own expense? Upon what principle, or, according to what reasoning, would the earned moneys in one instance inure to the benefit of the defendant and not in the other? • • •"

The Government argued in the Standard Accident case that the retained percentages are not "security" which is pledged to the performance of the contract, and which cannot, therefore, be applied to satisfy debts arising independently of the contract, but are merely, in the language of the Munsey opinion, "unappropriated sums which exist only as a claim" on behalf of the contractor against the Government. That being so, the Government argued that where the Government itself has a claim against the contractor, it makes no difference whether the surety's rights are based on the payment or the performance bond; that the fund in the hands of the Government belongs to the contractor; and that the Government has the right to apply such unappropriated moneys of the contractor in extinguishment of any debts he may owe the United States, whether arising under the contract or not.

The court held against the surety, the gist of its opinion being that the surety's right to any funds earned by the contractor arises primarily by reason of its subrogation to the rights of the contractor, and only secondarily by subrogation to the rights of the Government. The court stated that when a contractor is both a debtor and a creditor of the United States the surety cannot step into his shoes as a creditor and not as a debtor.

Without taking sides in the matter, it may also be noted that the Supreme Court stated in the Munsey case that a surety would rarely undertake to complete a defaulted contract if by doing so, it incurred the risk of losing more than it would by letting the Government complete. Ordinarily, the unearned contract balance at the time of default is less than the cost of completion, and if this unearned balance is the only money the surety can be sure of receiving, it could rarely undertake to complete a contract for fear the Government might later discover claims against the contractor and deduct them from the earned retentions. On the other hand, if the surety elects to let the Government complete the work, it is assured that the full amount of the retained percentages will be applied toward the cost of completion, regardless of any independent debts of the contractor.

It may be pointed out that the surety has an election, upon the contractor's default, whether to take over the work or not. If it elects not to complete, the Government must apply the retained percentages against the cost of completion. That being so, the Government is no worse off financially if it enters into an agreement with the surety to reimburse the surety's completion costs out of the retained percentages, if necessary, in return for the surety's promise to complete the work. There might be no legal objection to such an agreement from the Government's standpoint, although, in view of the Munsey case, it would probably be beyond the authority of the contracting officer to agree to reimburse the surety for expenses under its payment bond in the absence of some benefit accruing to the Government in return therefor. Of course, such an agreement could be made only in those cases where the contractor's right to proceed with the work has been terminated by the Government. If there is no formal termination of the contractor's right to proceed, payments under the contract will continue to be made to the contractor or to his assignee, if any. Furthermore, in the absence of termination, liquidated damages, if called for by the contract, are deductible from the contract proceeds even if the work is actually completed by the surety, while the Government's right to such damages under the standard Delays-Damage clause is destroyed in the event of termination. United States v. American Surety Co., 322 U. S. 96. It is apparent, therefore, that a surety might be prejudiced, particularly in the case of contracts which contain a liquidated damage clause or which have been assigned, by completing a contract for the contractor where there has been no formal termination of his right to proceed with the work.

That, gentlemen, brings me to the end of my discussion. I hope I have not added confusion to an already confused subject.

MODERATOR MANSFIELD: I think it may be said that it is the understatement of the day that surety companies were tremendously disturbed by the Munsey Trust Company decision of some few years ago by the United States Supreme Court. The surety always felt that there should be at least available for the completion of that contract the amount that the government had agreed to pay, and yet the effect of the Munsey Trust decision was to deprive the surety of some of those completion costs because of obligations of its bonded contractor entirely unrelated to that contract. However the surety company still felt that there was a little solace, that they could still rely upon the full contract bond amount being available if the contract itself had not been completed when the contractor had defaulted and the surety had to step in and complete. The surety felt very firmly upon that topic or subject, which was the reason leading to our selection of that topic for presentation here to day. Unfortunately, just a few weeks ago, June 5, 1951, the Court of Claims handed down the decision commented upon by Mr. Fisher in the case of the Standard Accident Insurance Company versus the United States of America. I know that there have been meetings in New York. I know that the surety industry is disturbed by that decision. I know that consideration is being given to the

possibility of an appeal to the United States Supreme Court of that decision. I have heard conflicting statements pro and con that the case would or would not be appealed, and I know not.

We place quite a burden on our next speaker by reason of the decision of the Court of Claims in the Standard Accident case, but I know of no more delightful gentleman nor a more able gentleman to present our side of the picture to good advantage than the Honorable George C. Bunge, of Chicago, Illinois. Mr. Bunge. (Applause.)

The Surety Point Of View

GEORGE C. BUNGE
Chicago, Illinois

MR. MANSFIELD and members of the International Association of Insurance Counsel: I think that this is the first time that I have ever been addressed as Honorable. I accept the designation although I am not quite sure whether it was intended as an epithet or as a mark of distinction. I will assume the latter.

On this subject of Government Claims and Tax Liens Under Contract Bonds, as Mr. Mansfield has pointed out, there has been a great change within the last few weeks. My assignment today is to present "The Surety Point of View" with respect to that subject which Mr. Fisher has discussed. I think I can safely say that "The Surety Point of View" in this particular matter can be described as a mixture of bewilderment, indignation, and consternation.

During the past few years the government has won a series of legal victories over the surety companies, culminating in the decision to which Mr. Mansfield referred, just a few weeks ago, (*Standard Accident Insurance Company v. U. S.* decided by the U. S. Court of Claims on June 5, 1951), which completely upset the basis upon which government contract bonds have been written for many years. As a result it is now necessary to find a new basis of operation in this field. The old landmarks which have guided surety underwriting and claim handling with respect to government contract bonds have been literally swept away and new landmarks have not as yet been found. The surety companies are like Moses in the wilderness—beset on all sides with difficulties and dangers which seem to be insurmountable, with respect to this particular matter, and looking for a way out.

Taxes have become so numerous and so high that every defaulting contractor is certain to be substantially in arrears to Uncle Sam. Furthermore, it is not unusual for a government contractor to be indebted to the government on other jobs. It now seems as a result of these decisions that both taxes, no matter how contracted, and unrelated indebtedness due to the government from a defaulting contractor, may be offset against and collected from the retained percentages and contract balances upon which the surety has been accustomed to rely. This means that every government contract, no matter how sound it may be, may develop into a loss for the surety if the contractor happens to have some other obligations or tax indebtedness to Uncle Sam. This, in the opinion of the surety industry, is illogical and unjust, and what is worse, impractical as well. It creates a situation in which sureties on government contract bonds find it difficult, if not impossible, to operate effectively in that field. The question now before the surety industry is how to do a government contract bond business under the radically changed conditions which these decisions have brought about.

Now, I do not believe that anyone can take issue with the legal propositions which have been so ably and clearly outlined by Mr. Fisher. The law is undoubtedly as he has stated it. Unquestionably, and in my opinion unfortunately, the right of the Federal government to set-off tax or other unrelated claims due from a defaulting contractor against sums payable under a government contract, to the prejudice of the contractor's surety, is well on the way to becoming an established principle of suretyship law, if it is not already an established principle of law.

United States v. Munsey Trust Company,

decided in 1947 (332 U. S. 234), established the government's right of set-off for taxes or other sums due from a contractor, as against a surety which had paid labor and material claims under the Miller Act payment bond. This latest decision, *Standard Accident Insurance Company v. the U. S.*, decided by the Court of Claims three weeks ago, appears to have extended this principle to the situation where the surety has taken over and completed the contract, in discharge of its operations under a Miller Act performance bond, at least to the extent of the retained percentages earned prior to the contractor's default.

While the Standard Accident Insurance Company case may be reviewed and could be reversed by the United States Supreme Court, the trend of the decisions on this subject seems ominous indeed to the surety industry. No one has yet suggested that the government's right of set-off extends to the portion of the contract price actually earned by the completing surety after it took over, and this now seems to be about the only portion of the contract price which a surety on a government contract can really depend upon in the event of trouble. In view of what has happened in the recent past perhaps we should not be too sure about that.

I do not need to tell this audience that for very many years the surety on the bond of a government contractor was believed to have lien upon, or equity in, the funds payable by the government under the contract to the extent of its loss, retroactive to the date of the bond. The decisions of the United States Supreme Court which established that principle and assured the surety the benefit of any contract balances in the hands of the government, are as you well know, the Prairie State National Bank case, decided in 1896, (*Prairie State Bank v. U. S.*, 164 U. S. 227) and *Henningsen v. U. S. F. & G.*, (208 U. S. 404) decided in 1908. Until the Munsey Trust Co. decision in 1947 (332 U. S. 234) it was regarded as settled law that a surety on a government contract who either completed the contract in discharge of its obligations under a performance bond, or paid for labor or material in discharge of its obligations under the payment bond, had to the extent of its losses an equitable interest in or equitable lien upon any retained percentages or contract balances due from the government with respect to that particular contract, and that this equity or equitable interest or lien related back to the date of the bond.

It was also regarded as settled law that this retroactive equity or equitable lien took precedence over any obligations of the contractor, including government tax claims, or liens. It was held in a number of cases that the rights of the collector rise no higher than those of the taxpayer whose right to property is sought to be levied on, and since the surety's retroactive equitable lien was superior to any rights a contractor might have in the fund, it would necessarily follow that any tax claims against the contractor or tax liens upon his property must also be subordinate thereto. The position of the surety is and always has been that, by reason of his equity in or lien upon the fund, only that portion of the fund which might exceed the amount of its loss ever became an asset of the contractor, and that only this portion, that is, the overplus over and above the surety's interest, can be subjected to the payment of any tax or other claims against the contractor. There have been many authorities to this effect.

Karno Smith Co. v. Maloney, (112 Fed. (2) 690.

Glenn v. Am. Surety Co., 160 F. (2d) 977.

U. S. F. & G. Co. v. Triborough Bridge Authority, 297 N. Y. 31, 74 N. E. (2d) 226.

Board of Supervisors v. Louisiana State University (La.) 26 So. (2d) 361.

Am. Surety Co. v. City of Louisville, 63 Fed. Supp. 486.

F. H. McGraw & Co. v. Sherman Plastering Co., 60 Fed. Supp. 504.

New York Cas. Co. v. Zwermer, 58 Fed. Supp. 473.

In Re Van Winkle, 49 Fed. Supp. 711.

In Re Heintzelman Construction Co., 34 Fed. Supp. 109.

Now, then, where did this set-off theory of collecting taxes from insolvent contractors at the expense of their sureties originate? As far as I can tell, this theory had been asserted by the General Accounting Office for a good many years, but it was a theory which was seldom if ever applied, for the reason that until recently taxes were not so important as they are today. The government did not have as many bureaus and departments to whom the contractors and other people became indebted, and as a result, while the General Accounting Office had always contended, so I am informed, that it was entitled to set-off

against the balances due under a contract any sums it might have coming from a contractor on any account, taxes, unrelated indebtedness, or anything else, to the prejudice of the surety on the bond of that particular contract, still as a practical matter it did not apply that principle, perhaps because it did not have the occasion to apply it. However, about 1943 it began to be applied, and that is when this whole series of events began which has produced what I believe to be a crisis in this particular branch of the surety industry.

In about the year 1943, there were pending in the General Accounting Office a number of cases in which sureties which either had completed government contracts, or had paid laborers or materialmen, were seeking to recover contract balances in the hands of the government. A number of the defaulting contractors were heavily indebted to the government for taxes or other obligations. In some of these cases the government was in a position to claim a statutory priority. I will not go into the detail of that now, but there are various federal statutes, as you know, which give the government priority in payment from insolvent estates under certain circumstances. In some of these cases the contractor was insolvent or had made an assignment for the benefit of the creditors, which meant that the government could claim priority in payment under those statutes. In other cases it could not. But the General Accounting Office at that time set up a claim of set-off in all of those cases, and just deducted everything they could find to be due to the government from any contractor which was involved in any of these jobs, from the balance in its hands, which the sureties considered to belong to them. The net result of this was a series of cases in the Court of Claims and in the United States Supreme Court, resulting in the two decisions which have been mentioned here.

Naturally, this attitude of the Comptroller General and the General Accounting Office caused considerable uneasiness in surety circles. In August 1943 Mr. E. V. McCahan, Jr., of the Fidelity and Deposit Company of Maryland, discussed this subject at some length in a paper before the Fidelity and Surety Insurance Law Committee of the American Bar Association, to which I would like to refer anyone who is interested in this subject. Mr. McCahan, in this paper, effectively pointed out that the government's priority under any of the statutes referred to logically could only operate upon the interest of the contractor; that the contractor's interest itself was subordinate to the surety's equitable lien; and that the net result of the Comptroller General's position was to make the surety a guarantor of the payment of the contractor's taxes, and other unrelated indebtedness to the government, which the surety had not contracted for and should not be expected to do. I think Mr. McCahan's remarks in that article make very good sense, and that they make just as much sense to me now as they did then. Unfortunately his views were not accepted by the General Accounting Office or by the courts.

The Court of Claims first ruled, in this series of cases, that the General Accounting Office was justified in claiming the right of set-off where the government was entitled to a statutory priority in payment, but that it was not justified in taking the set-off where the government could not claim a statutory priority. However, the government was not satisfied with this, so it took the Munsey Trust Company case up to the Supreme Court. That case had been decided favorably to the sureties in the Court of Claims, on the ground that the set-off was not permissible where there was no statutory priority. The Supreme Court reversed the Court of Claims on this point, and announced the rule which is at the bottom of this entire discussion, that any claims against a defaulting contractor that the government has can be set-off against and deducted from any funds the government has in its hands arising out of the contract bonded by the surety, except, perhaps, those earned after the surety took over.

I shall not attempt to discuss this series of decisions in detail, but there are two very interesting articles about them for anyone who is interested. One appeared in the July 1946 issue of the Insurance Counsel Journal, by Mr. Harry Cross of the United States Fidelity and Guaranty Company, and the other in the July 1947 issue of the Insurance Counsel Journal, by Mr. John J. Malley of the National Surety Company.

I cannot help but comment at this time upon Mr. Fisher's statement that he and his colleagues in the General Accounting Office consider themselves to be essentially neutral in controversies between the government and the surety industry, and that they only act in a fine impartial spirit

to ascertain and apply the law. The devoted public servants in the General Accounting Office, the Treasury Department, the Department of Justice, and elsewhere in the government who think up such theories as were followed in the Munsey case, and prevail upon the Supreme Court to adopt them, are undoubtedly very intelligent and able men and fine lawyers, but when they claim to be neutral, I will have to enter at least a mild dissent. From our side of the fence it looks as though they are imbued with quite an active zeal for collecting as much as possible from the citizenry in general, and from the surety companies in particular, which may be only natural since that no doubt is what they are paid to do. As Mr. Fisher says, whenever they are in doubt about a matter, they simply refer it, as is their duty, to the courts, and somehow a government official, present company excepted of course, always seems to have very serious doubts about the rights of anyone whose interests are opposed to the government, and to be very articulate in expressing them. During the last war neutral countries were spoken of as "neutral in favor of" or "neutral against" the Axis or the Allies, as the case might be. I hope that Mr. Fisher will pardon me if I venture the remark that it seems to me that his colleagues in government service have been "neutral in favor" of the government, if one can use that expression, and "neutral against" the surety companies, in matters affecting the collections and revenues of Uncle Sam.

The Munsey Trust Company case, as has been said, was decided in 1947. This created something very much akin to consternation in surety ranks, as most of you know only too well. While the surety industry was aware that the General Accounting Office was contending for this unrestricted right of set-off, it could not really believe that that claim would actually be sustained by the Supreme Court. Although surety companies ordinarily are not exactly babes in the woods in matters of this kind, the reaction of the surety fraternity when this decision was announced was much the same as that of Little Red Ridinghood when she learned the truth about her grandmother's big white teeth. They just could not believe it, and I have a hunch that our friends in the General Accounting Office themselves were surprised that their arguments had been so completely accepted by the Supreme Court.

I shall not attempt to discuss the reasoning of Mr. Justice Jackson in the Munsey Trust Company case. That has been done by almost everybody in the surety industry, and practically everything that can possibly be said upon that subject has already been said. With deference to the Supreme Court and to Mr. Fisher I shall simply say that we consider it to be a legal and logical monstrosity. The Supreme Court in its decision sort of plays with the theory of subrogation like a cat with a mouse. It assumes that the surety must find someone who has rights superior to those of the government to be subrogated to, and then proceeds to demonstrate to its own satisfaction that none of them has any rights that the government as a claimant or as a tax collector need recognize. My own feeling is that while Mr. Justice Jackson has written a very clever opinion, and has made a number of very effective debater's points, he has not really gone to the root of the matter. As pointed out many years ago in the Henningsen case, the surety's equity in these situations arises not only by subrogation to the legal rights of someone else, but also from the equitable proposition that those who contribute to a project have an equitable right to be paid from the fund set up to pay for it, before someone else. The statements in the Henningsen case and in many other cases to the effect that the government has an equitable duty or obligation to see that laborers and supplymen are paid from this fund is one reflection of this principle. Another is the settled rule of suretyship law that, where a contractor is indebted to a materialman for materials furnished for two different jobs, the surety upon one of the jobs is entitled to insist that the proceeds of the job for which it is surety must be applied upon obligations arising from that particular job, for which it is liable, in preference to obligations arising from the other job, for which it is not liable. In these cases the surety does not have to find someone whose rights it can be subrogated to, as the Supreme Court in the Munsey case seemed to think was necessary. It has an equitable right by virtue of the suretyship relation to insist that funds arising from the job for which it is surety be applied upon or in reduction of the obligations, actual or potential, arising from that job, rather than to something else.

It seems to me that the principle of these decisions is directly applicable to the sit-

uation before the Court in the Munsey Trust Company case, and logically should preclude the government from applying funds arising from a contract bonded by a surety, upon other unrelated claims for which that surety is not responsible. The basic equitable proposition that fair play to the surety requires that the proceeds of the job which it has underwritten be applied first to discharge or relieve obligations arising from that job, does not seem to have been considered by Mr. Justice Jackson at all.

At the American Bar Association Convention at Seattle, Washington, in 1948 Mr. W. Braxton Dew of the Aetna Casualty and Surety Company, who was one of the attorneys in the Munsey Trust Company case, presented a paper on that case. Mr. Dew felt very strongly about that decision and so expressed himself. He pointed out very convincingly why it is legally and logically unsound. Basically his thought was that if the surety has a true equity in or equitable lien upon the fund, retroactive to the time the bond was written, as the Supreme Court itself has held, the government ought to be required to respect that equity or equitable lien as much as anyone else. Mr. Dew also had a good deal to say about the practical effect of the Munsey Trust Company case and concluded that it has left the sureties in an impossible position. I would like to give you a brief quotation from Dr. Dew's comments in that article, which expresses the viewpoint and outlines the problem of the surety industry much more accurately and succinctly than I could possibly do. Among other things, Mr. Dew said:

"The most important single item in the underwriting of a contract bond is the supposed sufficiency of the contract fund to cover the cost of the operation, but if this fund is to fluctuate or perhaps disappear by confiscation and set-off depending on chance and mischance, and arising out of transactions and causes foreign to the surety's risk which cannot be known or evaluated in advance, then, no stable basis remains for the exercise of a sound underwriting judgment. A contractor not indebted to the government today may have become heavily indebted to it or one of its agencies tomorrow, and the contractor largely indebted today may find himself unable to get bond.

"The present position on set-offs is clear: the contract funds are likely to disappear at any moment like bats from the light of day with the result that the surety may be left to pay the bills on an entire project without getting the basic consideration upon which it relied when it assumed the hazard.

"Any contractor can complete his work if he does not have to pay his bills as he goes along, and since he can get almost unlimited credit on the strength of the payment bond, he usually leaves the bills until the end. The great preponderance of losses comes about through his failure to pay these bills rather than through his failure to complete the physical work. If the contract fund is not to be there to stand between the surety and these losses, the *sine qua non* of its underwriting has disappeared, and no form of words can disguise the fact that it is being held to the burdens of the contract and deprived of its benefits, a sort of forfeiture or species of injustice which has been frowned upon by courts of equity almost since the time of Henry VIII."

You can see how strongly Mr. Dew felt about this. He goes on to say:

"Sureties have always expected arguments of one kind or another with third persons over the contract fund remaining at the time of the default—arguments in which they had every reason to expect to prevail—but in simple truth it had never occurred to them until recently that the fund might not be there at all, and that they would be left without recourse against the owner who confiscated it or otherwise failed to pay it according to agreement. This knowledge has now been brought home to them and it works such a violent change in their obligation as they understand it that it can only be described as a metamorphosis."

I believe that even Mr. Dew was not prepared for the latest decision of the Court of Claims three weeks ago in *Standard Accident Insurance Company v. the United States.* All of the previous set-off cases pertained to payment bond sureties who paid laborers or materialmen, who did not themselves have any direct legal claim upon the contract balances. It had been considered that the surety on a performance bond was in a somewhat different and

much stronger position. The performance bond surety actually completes the contract and, as held in the Prairie State National Bank case many years ago, is subrogated to the rights of the government in the retained percentages and contract balances, which of course are held for its security, as well as for the security of the government. If the performance bond surety did not complete the contract, it would be entitled to credit for these balances in determining the amount of its liabilities under the bond. Heretofore it has never been thought that a surety could or might be in a worse position in this regard by reason of coming forward to complete the job, than it would have been if it had just sat by and let the government relet the work. Yet this is essentially what the Court of Claims has now held. If I understand that decision correctly, the government may now collect any tax or any other unrelated claim it may have against a defaulting contractor by setting them off against any retained percentages or contract balances in its hands which were earned prior to the time the surety took over, even as against a performance bond surety who actually completed the contract at its own expense. If this is the law the surety on a government performance bond cannot afford to step forward and complete a government job unless it is willing to risk losing all benefit on final settlement from retained percentages or contract balances earned prior to the time it took over. If the performance bond surety simply sits back and lets the government relet the work. it will at least have credit for all retained percentages of contract balances in determining the amount of its liability under the bond. That it should be deprived of the benefits of these balances when it steps in and completes the work seems to me the height of illogical absurdity. It is to be hoped that the Supreme Court will see fit to review and to reverse this latest decision of the Court of Claims. However in view of the course which has been taken since 1943 the surety industry is justified in being apprehensive of the ultimate results.

I interpret the decisions which have been discussed as one reflection of the tremendous expansion of governmental activity in recent years. Viewed from this standpoint, the apparent lack of logic in these decisions is at least understandable. The United States Supreme Court in the Munsey Case and the Court of Claims in the Standard Accident Insurance Company case pay lipservice to the old principle that a surety has a retroactive equitable lien upon or equitable interest in the contract balances, but they say in effect that that lien or interest is no good against Uncle Sam. The fiscal problems of big government are urgent, indeed, and there seems to be a feeling in some quarters that paying taxes is the primary function of the citizenry, and that the greatest good for the greatest number will be achieved by collecting the greatest possible amount in taxes from them. I can understand that viewpoint, but I think it is very short-sighted.

I would like to call to your mind for a moment what the basic function of the surety is with respect to government contract bonds. Obviously furnishing financial security to the government, while important, is not the surety's primary function in connection with government contracts. The government is so big and so rich and has so many means and resources, that it is better able to run the risk of financial loss or financial disaster than any surety company, or all surety companies, put together. Government contract bonds are not taken soley because the government must be protected against losing money. Obviously the surety industry charges premiums for its services. It must make a living. It must charge enough in premiums, which form a part of the cost of government work, to pay its losses, and leave a profit for those who work in the surety companies. The government, if it were only seeking security against financial loss, might well be a self-insurer, rather than pay premiums to surety companies.

However, this is only part of the story. What the government really wants and gets from the sureties on government contract bonds, in addition to financial protection, is the indispensable service which the surety companies provide. In the first place, the surety companies decide what contractors are dependable. They decide what is a reasonable price for a job. They decide on what terms a contract makes financial sense, and when they make that decision, they back up the contractor by writing his bond. The government gets the benefit of this specialized and very competent service that surety companies render in selecting contractors, checking on the cost of the work, verifying the fact that it is feasible, and verifying the fact that it is financially sound. The second service that the surety companies perform which

the government is not really in a position to perform for itself is that, you might say, of a fire department. When trouble occurs on a government contract, the surety company is right there to pick up the pieces, to put them together, to see that the work is performed, and the job carried through to completion. If it were not for that service every contract would have to be relet, bids would have to be called for, there would be delay and additional expense, and all sorts of difficulties would arise. These are the things that the surety on government contracts is paid to do in addition to assuming financial risk: to act as an agency for determining who are reliable and competent contractors, and for checking their work and their bids, and to act as a fire department, or, in other words, to provide a cleanup service and a completion service when trouble comes into the picture. For this the surety companies receive a premium which covers the cost of those operations and the incidental losses which they may sustain. This is the service which the government really expects and pays for when it requires the contractor to furnish a contract bond.

Now, what is the effect of these decisions? The effect of these decisions, as Mr. Dew pointed out, is to destroy the basis of underwriting. Heretofore a surety company, when a contract bond was offered to it, looked the contractor and the prospect over to see if he were a competent contractor, and to see if he had the right kind of equipment, to ascertain on the basis of its wide experience in the field, whether his bid was sound; and to check into all those different details which go to determining whether the contract can be carried out, and whether this is the man to carry it out, before writing the bond. Because the surety knew that there would be received from that job so many dollars which, directly or indirectly, would go into paying for that job, it also knew that if they did a good job of signing up the contractor, checking his capabilities, and analyzing the job, it would not sustain any loss. In other words, it would be earning its premium by doing a good job in investigating, analyzing and checking that contractor and that job.

Today, as a result of the Munsey case, all this makes no difference—or at least it makes much less difference—because any unrelated and outstanding taxes or other claims against the contractor, may also, in effect, have to be paid by the surety. Another underwriting element is introduced into the picture: Is this contractor financially sound enough so that the surety can take a chance that he has not and will not incur any tax or other unrelated obligations that he cannot pay? Any of you gentlemen who have dealt with contractors know that the contracting business is such that very few contractors can be described as financial rocks of Gibraltar. Most of them have all their capital, or most of it, invested in their jobs and for a surety to guarantee that they are not going to have any obligations to the government in any connection whatsoever is a horse of a much different color, than just to guarantee that a particular job will be put through in a particular length of time and for a particular price. I do not know what the result will ultimately be if the Munsey decision remains the law. I suppose many surety companies will feel that they can not afford to underwrite government contract bonds except for contractors who are exceptionally strong financially, and, as I said before, this will mean that many responsible and worthy contractors will be unable to get bonds and thus will, in effect, be excluded from government work. I am sure the net effect of such an underwriting policy upon the contracting industry and upon the government itself will be most unpleasant.

The "fire department" side of the matter is even more unfortunate. Mr. Fisher stated to you just a few minutes ago that under the Standard Accident Insurance Company case, he does not see how a surety company can afford to rush to the rescue and pick up the pieces when trouble has occurred, because if it does so, it may lose all the contract balances for which it otherwise would get full credit in determining the amount of its liability under its bond. We have the fire department all ready to go; the bell has rung, and the firemen are on their seats, but we cannot turn on the hose, because if we do we may find that we have let ourselves in for a substantial loss, which we would not have sustained if we just sat back in our firehouse, and let the building burn down.

It seems to me that the basis for underwriting government contract bonds is destroyed by these decisions, and not only that, but it has become impossible for the surety companies to render the service to the government which is paid for by the premiums that are figured into the cost of government work. In effect, the government has fixed things in such a way, by these de-

cisions, that the sureties cannot render the service—which is essentially what the government is paying premiums to get. It reminds me a little bit of a poker game in which one player has won all the money. The government in effect has won all the money in this game; the sureties cannot keep on playing because the government wins every time. The old game is over, in one manner of speaking and what has happened is, if these decisions are sustained, that we have a brand-new game. To take the analogy of a football game, the two sides can compete very vigorously, and contest every yard, but they must be agreed upon the rules of the game; they must know that if one side holds the other side to less than ten yards in four downs, the referee will give it the ball. When those rules are respected and enforced they have a basis of understanding which permits the game to go on; and the two sides can compete as vigorously as they want to within the framework of these rules which have been agreed upon. But suppose that in the middle of a football game the captain of the government team says to the referee, "We want to have five downs instead of four," with four for the other side. Mr. Fisher will not think it is a fair analogy, but I think it is. The referee says, "Yes, you are the government, so we will give you five downs."

Now, then, whatever else you may say about that, you have a brand-new game. You have a game for which you have to formulate new rules and new procedures. You are in a different league, you might say. You are in a different situation than you were in before. You have an unsolved problem which has to be resolved, and the only way you can resolve it is by agreement with your opponent, or, in other words, by establishing new rules for the game, which brings me to the last point that I want to make today.

The situation brought about by these decisions, with which the surety industry is now faced, can be resolved in three ways: First, we can prevail upon the supreme court to reverse itself in the Munsey Trust Company case and to reverse the Standard Accident Insurance Company case. That may be visionary. If the courts did that, they would restore the rules of the game to what they were considered to be before the 1947 decision, and we would go on about our business as we have in the past. This would solve the problem, and unless and until another solution is found, I think that it should at least be tried.

Second, we can perhaps obtain legislation which would restore the old rules of the game. What the chances are on that point, I do not know. I understand that such an attempt was made some time ago, and received very little response; and the reason there was so little response, so I am told, is that government agencies generally, including Mr. Fisher's office, did not realize that the government would benefit just as much as the surety companies by having workable rules for this game. The service that the government expects to get and wants to get from surety companies cannot be delivered if old rules are changed, as they have been changed, so that the surety companies cannot operate. That is another possibility.

A third possibility which might ameliorate the situation, at any rate, is to work out what are called "take-over agreements," and to induce the government to approve them. Mr. Fisher has also touched upon this possibility. Where a government contract goes into default, the surety is under no legal obligation to complete it, and has the option of sitting back and letting the government relet the job. Previously the surety would usually want to complete the job, and it would, of course, be to the interest of the government for the surety to do so. But after *Standard Accident Insurance Co. v. U. S.*, the surety cannot afford to step in and complete, without some assurance or understanding as to the disposition of the retained percentages and contract balances. Possibly a basis can be arrived at for entering into an agreement with the various government departments, under which, in consideration of the surety stepping in and completing, the government will agree to give the surety the retained percentages and contract balances, which the sureties had always considered themselves entitled to, and for which they can get credit anyway, simply by failing to complete.

Of course the surety industry will live with and under these decisions if it has to. If the rules stay the way they now appear to be, the way the government has formulated them through these decisions, I suppose we will have to adopt very conservative underwriting and claim policies. The sureties will just have to complete very few jobs, or no jobs, and turn down all contractors who cannot show a safety deposit box full of government bonds.

They will have to play it close to their vest for obvious reasons, because anything else would be financial suicide.

On the other hand, if the government can be brought to see its own best interests in this matter; if Mr. Fisher and his colleagues and the men in the other government departments can be shown that the interest of the goevrnment itself is advanced by permitting the surety companies to perform their specialized services without risking financial suicide; to back up the contractors who deserve being backed, no matter how small they are or how modest their bank accounts; to send the fire department out to put out the fire on a moment's notice whenever a fire breaks out—if we can convince the government and its officials and bureaus that it is to the government's interest to restore a situation in which we can provide the service we are peculiarly equipped to provide, and which we have provided for all these years —then perhaps we can, through one of the measures I have suggested, arrive at a sane basis which will permit us to continue.

I believe that it reflects the viewpoint of the surety industry about this matter—and I would like to communicate it to Mr. Fisher—runs something like this: We congratulate you government men upon your legal victories. You have won your cases in court. You are fine lawyers. You have put over your legal point. You have won. We salute you as worthy adversaries and we respect you for your competence and your devotion to the interest of our government. We venture to suggest, however, that the best interests of the government itself require either that the old rules of the game be restored, or that new procedures and practices—in other words new rules of the game—be formulated, which will at least make it possible for us to furnish the service to the government which we have been accustomed to furnish and which the government requires. We realize, further, that we cannot solve this particular problem without government cooperation — without cooperation on all levels in the executive branch of the government. We accordingly request your assistance to bring that about, and offer to you our full cooperation to that end, and hope that through our mutual efforts a formula can be evolved which will enable the surety industry to provide our government with the greatest possible value in service for each dollar in premiums which, directly or indirectly, the government pays.

MODERATOR MANSFIELD: I think the audience will agree with me now that when I addressed George as "Honorable" it was not intended as an epithet.

If I were to be permitted my own personal observation, I would just like to stick my chin out a little way and I would like to see this Standard Accident case go upon appeal to the United States Supreme Court. When the United States says to a contractor and a surety, "Here is a box of golddust," if you please, to complete a particular government project, and then when they step up to that government project and take a pile of that golddust away from the surety, I think they are doing something that is neither legal nor logical nor equitable.

Gentlemen, we got a little bit of a late start. We would like to have a little bit of discussion from the floor. If any one has any questions or desires to make any remarks, and I know we have some experts here, would you kindly rise, address either Mr. Fisher or George Bunge, and state your question?

MR. WILSON ANDERSON (Charleston, West Virginia): In a government contract where the contractor borrowed money from a bank—in this particular instance, $40,000—and subsequently the bank discounted the note with the RFC for $30,000, retaining the interest to the bank, and then the RFC notified the Bureau of Reclamation to off-set against a progressive payment that was due the amount of the loan of $40,000 against that fund, how does the General Accounting Office arrive at that conclusion without first exhausting the security which they had in the form of a chattel mortgage on the personal property of the contractor and a real estate mortgage upon the real estate of the contractor?

MR. FISHER: I am not familiar with that situation at all, and of course we have nothing to do with the RFC's claims. That is an independent organization and has a right to sue and be sued on its own behalf. It seems to me that it was just the facility with which they could accomplish the deal.

MR. ANDERSON: But they did not exhaust the security which has always been the primary rule of law.

MR. FISHER: And that was against the surety's interest in that fund?

MR. ANDERSON: It is against the surety's interest and also the government

agency is protecting a private enterprise to a 25 per cent participation in this loan.

MR. FISHER: I am certainly ignorant of that whole transaction and I cannot answer that question, because I am sure it did not come to our office.

MR. ANDERSON: I was told that it had generated through your office through the RFC, and that is the reason I raised the question.

MR. FISHER: I am not aware of it at all.

MR. ERNEST W. FIELDS (New York, New York): I have a question for Mr. Fisher. I think during the past year at least four suits have been filed by the government under payment bonds, claiming that Social Security taxes, unemployment taxes, or withholding taxes are collectible under such a bond as labor material. Does the General Accounting Office have any position on that?

MR. FISHER: Do I understand you to say that they are being sued on the theory that the taxes are labor and materials?

MR. FIELDS: It is a little difficult to tell in these particular cases because they are cases where the surety has taken over and in cooperation with the contractor completed, and we are not sure whether the government's position is that the surety is liable because it became a partner of the contractor, or whether the government's position in the future will be that it is entitled to collect these taxes as being labor and material. That arose on the job.

MR. FISHER: I was under the impression that we did not consider the taxes as a part of the labor and material.

MR. FIELDS: There have been four suits on it, but the government does not have a firm position that they will try to collect that, as far as you know?

MR. FISHER: As far as I know. I suppose they are probably fishing on the thing.

MODERATOR MANSFIELD: We certainly hope that the government does not tangle with the fish and get it on the hook in that case. I think under the authorities, as they are set forth in Mr. Bunge's article, it may be safely said that the government may present no claim properly on such tax liens as against your so-called lien bond. There may be some danger in the situation, but I think we are going to have a statement of law handed down, because I think the authorities are favorable.

MR. HAROLD W. RUDOLPH (New York, New York): I just want to express appreciation for the able presentations that have been made by these two speakers. They have been very helpful to me. I would like to add just one word. I am on the panel of Home Office Counsel of a surety company which is pretty active in the contract-bonding field. I think it has very well stated that the function of these companies is to both select and service as regard the contract-bonding field for the government we help. We help to select the contractors for you, Mr. Fisher, and we do come in there, as Mr. Bunge has said, as the emergency squad to service completions and insure your continuity of work when the default takes place. One of the glaring absurdities, to me, if I may just take your time a moment further, is that the government will deal with third parties on an entirely different basis than they will with these selecting and servicing sureties. The government has to minimize its loss in the case of a default in case it wishes to come back on the surety bonds in the case the government sees this problem through to completion, and it has to go through a reletting process. A surety could find presumably somebody to do the job at a figure within its normal bond exposure and put that contractor in as a bidder when the reletting comes around, and if that person is low the government has to pay out all these unpaid contract balances to that third party. How in the name of logic and equity and just simple decency of contractual relationship can the government be permitted to deal on a different basis with that third party at a letting than it does with the surety whose equities have been so well described, and I feel that frequently that is admitted by Mr. Fisher's colleagues in the General Accounting Office. I, for one, am very hopeful that these problems can be given the benefit of some immediate cooperative work between the government bureaus and the sureties rather than to rely on the uncertain paths of further litigation and legislation. I would like to see even this Fidelity Insurance Committee in this Association perhaps make an effort during this ensuing year to bring about a larger measure of cooperation between the surety industry in this contract-bonding field and government agencies, those bureaus which are

particularly active perhaps in the procurement of construction work under the Miller Act where that kind of bond is called for—I am thinking of the Engineer Corps and the Reclamation Bureau, which are, I think, bureaus which have most of that procurement—to see if a take-over agreement cannot be agreed upon in the event of a contractor's default on a government project which will bring about a substantial, equitable result, which I am sure both government and the surety industry would like to see happen.

MODERATOR MANSFIELD: Harold, I think you may have undertaken a little assignment because you are the incoming Chairman of the Fidelity and Surety Bond Committee, and I think I would like to recommend to the Executive Committee that possibly that authority might be conferred upon Mr. Rudolph and his committee to see if we can work something out.

George Weichelt, did you have something?

MR. GEORGE M. WEICHELT (Chicago, Illinois): I want to express my feeling, and I think the feeling of everyone here, of appreciation for the splendid papers that have been delivered. I know what George has done. I would have a lot to say if it had not been so well covered. Since these decisions have come out, from the Munsey case down, I have always felt that the approach was wrong in trying to assert the surety's rights. I do not believe, although the books all say so, that the surety has an equitable right. I think basically they have a vested right and I think that that should be the position taken. If you study the conception I think you will so find.

Secondly, we are indebted to the government to some extent, but the Supreme Court has held—and that has not been reversed—that if the government steps down from its sovereign capacity and enters the field of commerce it should be dealt with the same as any other litigant, so I think that in any future contention we can justify it, instead of saying we have a visionary or an equitable or a far-reaching right in that fund. I think basically and on the basic law of the surety industry that right is vested. We can go to a contractor and we can ask him for a financial statement—what are your debts, and so on, what do you do?—but how in the name of common sense can we ever find out whether there is any hidden tax indebtedness or any other government indebtedness? One of the things that should be required of the government by sureties is a list of what claims the government might serve upon a bond wherein nothing could be added by way of set-off beyond what they have asserted they may set up as a claim. With the same regard for sureties, they will know what may come up, regardless of whether the Standard Accident decision is reversed or the Munsey decision is reversed.

The surety companies should know in the beginning what they might face just the same as when you are taking a financial statement from a contractor, wherein you know what debts he has outstanding, and once having committed itself the government should not be allowed to add anything in the way of set-off or counter claim.

I think we should give a rising vote of thanks to these two able speakers. I have had a great many surety round table talks and discussions, but I have never seen the subject handled more ably, and I suggest we give them a rising vote of thanks with applause. (Applause)

MODERATOR MANSFIELD: Thank you very much. If there are no other comments, I will ask Mr. Kristeller to come forward. I think he is supposed to dismiss this meeting.

We have papers available for distribution. Those of you who are especially anxious to get them please come forward now because we are going to put them on the shelf later.

Thank you.

MR. KRISTELLER: There being nothing further except to extend thanks on behalf of the Open Forum Committee for this able discussion, I will close the meeting.

The next meeting of the Association will be at 9 o'clock tomorrow morning and a fine program has been arranged. We will adjourn until 9 o'clock tomorrow morning.

(Whereupon at 12:40 p. m., Friday, June 29, 1951, the Open Forum meeting was adjourned.)

SATURDAY MORNING SESSION
June 30, 1951

The second general session of the Twenty-fourth Annual Convention of the International Association of Insurance Counsel, held in the Auditorium of The Greenbrier, White Sulphur Springs, West Virginia, convened at 9:15 o'clock a. m., Wayne E. Stichter, president of the Association, presiding.

PRESIDENT STICHTER: The second and last general session of this twenty-fourth annual meeting is now in session.

We are favored today by the appearance on our platform of a celebrated clergyman, editor, and author, one of the foremost speakers of our country. Dr. Poling was born in Portland, Oregon, was educated for the ministry and took post-graduate work at Ohio State University. He has been the recipient of the degrees of Doctor of Divinity and Doctor of the Humanities. He served as chaplain in World War II throughout the North African campaign and in Europe. He is the father of Reverend Clark Poling who was chaplain on the troop ship Dorchester which was sunk by an enemy submarine in the North Atlantic and who gave his life jacket to a soldier, as did the other three chaplains on board. As you all know, all four of those chaplains went down with their ship and the heroic sacrifice was commemorated several years ago by a special postage stamp issue showing the pictures of these four chaplains.

Dr. Poling is a distinguished man and I know that you will be greatly interested in what he has to say. His subject is "What Price Freedom—Now?"

What Price Freedom—Now?

DR. DANIEL A. POLING
Editor of the Christian Herald
New York, New York

I WOULD like to add to my introduction this morning because of the subject that has been assigned me. I am Chairman of the All-American Conference to Combat Communism. This conference is, Mr. President, the most unique conference ever set up under the flag. There are now fifty-one national organizations officially identified with the conference and supporting it financially, and an additional thirty national organizations are being serviced by it. Among these national organizations are groups and agencies of every faith and of every race and of every economic relationship.

To illustrate, the American Federation of Labor, the National Education Association, the Catholic Welfare Board, the Catholic Veterans Organization, the Jewish Welfare Organizations, Federal Council of the Churches of Christ in America, all chartered veterans organizations, and all fraternal organizations that have a national headquarters.

These organizations have many things that set them against each other. For instance, some of these organizations are bitterly opposed to the Taft-Hartley Law. The American Federation of Labor is opposed to the Taft-Hartley Law. Other organizations are just as ardent in their support of the Taft-Hartley Law. Some of these organizations favor federal aid to parochial schools. Other organizations are opposed to federal aid for parochial schools. But these agencies have one thing in common: they are opposed to Communism. And the conference has become increasingly a clearing house for them, though it is only one year old in its active history, and I shall indirectly be speaking of the program of this conference, so I shall not refer to it directly again.

We live, Mr. President, in a confused time. It is not to be wondered at that our children are confused because their parents are confused.

You may have heard the story that I heard in Texas a few months ago of a gentleman who was riding on a streamliner for the first time. He got up in the morning and went into the washroom, found three basins inside side by side. The one on the left was occupied and the one on the right was occupied, so he moved into the center one and spread out his

shaving equipment and just then the train took a curve at 100 miles an hour and the room was thrown into confusion. Eventually they untangled themselves and went back to work, the man on the left to the left basin, my friend in the middle, and the other gentleman on the right. Presently the man on the left said, "Pardon me, sir, but you are washing my face," and the man in the middle said, "Well, I am sorry. Well, who is washing my face?" The man on the right said, "I must be the guilty party, I apologize, because the face that I was washing just now stopped talking" (laughter).

I assume we are not as confused as that, but increasingly we are in confusion. On one point however there should be no confusion: Freedom is not free! Always freedom has a price and to this hour always that price has been paid. Our American freedom is at once an inheritance and an achievement. We received it from those who went before us—from the founding fathers and mothers—and if it is to be maintained it must be maintained now and the price of freedom must be paid now.

I began saying a good many years ago, before I knew much about what I was saying, that I had no right to take freedom for myself and for my child and for my community in my time unless I was willing insofar as I could, unless I became increasingly willing, to pay the price of freedom, and I came to see that there were men and women who would not steal a cent, who would not misappropriate a single dollar of a trust fund, who were taking their freedom without paying for it and that began by neglect of the ballot; fifty per cent and sometimes less, as by elections, going to the poll, registering and voting when today again young men of the republic are dying to preserve that right. Yet so often we would not stir ourselves from an easy chair to cross the street, to go around the corner and exercise the franchise. Freedom is not free!

I am not far from the spot where Samuel Putnam identified himself with a new community in the Ohio River Valley. Samuel Putnam may have been less famous, but certainly not less patriotic than his famous brother, Israel Putnam, the Revolutionary hero. Samuel Putnam made his contribution too. He became a founder of Marietta and of Marietta College. He was a very religious man and as he grew older he was found less freqeuntly in a sanctuary. Eventually a young cleryman came out from Boston and was very much disturbed when he found that his most distinguished parishioner was not going to church, so he went to see Father Putnam and he began by asking Father Putnam how it was with his soul. He said, "Father, how is it with your soul?" He did not hear him and just nodded and smiled and leaned back in his chair. The young man was persistent, so he came closer and fairly shouted in the half deafened ear of the old gentleman. He said, "Father, how is it with your soul? Are you afraid to die?"

And the old man heard that. He straightened himself slowly, his faded eyes became alive with their memories, and eventually he stood erect and then he dropped a hand heavily on the shoulder of the earnest young clergyman and said, "Young man, you ask me am I afraid to die. Young man, I shall never die. I fought for liberty under George Washington." He felt that way about it. He had identified himself with freedom. He had become part of freedom and he knew that freedom was deathless and he had taken on a certain quality that has to do with eternity itself because of his identification with the cause.

But what price freedom—now? I submit to you, first of all, the price of freedom here and now is knowledge. We need to know our freedom. We need to know the facts of freedom's life. We are drifting away from some things that formerly we held very important. I learned American History in Oregon where they taught it and taught it well, and a little brown-eyed woman who was born in Virginia, Mary Donohoe, who is alive today at eighty-four, taught me. When I go back to Portland I always go to see her, since my mother is no longer there to welcome me. She taught me American History and she gave me pride in my country, but do you know in the past few years American History has been neglected or abandoned in the public schools of Oregon? You may be finding the same situation in your communities and in your states. The New York Times conducted a survey, reported last September, that had to do with history, and more recently a survey in geography with which you may be acquainted. That survey also appeared in Readers Digest for September in which it was revealed that two-thirds of the teachers colleges of this country did not as of then require a knowledge of American History for registration. Some of the particulars were rather

confusing. First, thousands in a questionnaire gave the wrong answers when they were asked to name the President of the United States during the War Between the States, and, believe it or not, thousands did not know the name of the President of the United States as of World War II. But nearly everybody knew that Walt Whitman—a little confusion in the name—was a great bandmaster; that as of last year.

We need to know America! And then we need to know the situation in our community life. This revealing conference in New York, a timely conference, was conducted by the American Legion, in which narcotic addiction was given a careful look into. The charge was made by important and responsible officers in the Department of Health that in nine great cities, including my city of Philadelphia, drug addiction among the adolescents had become epidemic. I was in Detroit when the news broke, bannered across the front page of the Detroit Free Press, which told as of the night before the FBI in cooperation with the Narcotic Division of the Detroit Police Force had raided 200 hot spots or drug spots, every one adjacent to a public school. Some of my Detroit friends who are here remember that. Fifty-seven peddlers of dope were taken into custody. Nearly a hundred boys and girls became witnesses, producing evidence and offering testimony. The statement was made and verified that three years ago that ring had been practically destroyed, and then it moved in on the children.

United States Senator Kefauver has gone on record, I believe, as indicating his support for the making of the selling or distributing of dope to minors a capital offense. I talked to Barney Ross in Chicago some months ago. Barney Ross as a result of wounds and opiates taken in the Pacific became a drug addict. He is free now, for a little while at least, he says. He feels that way about it too. He feels that it is worse for a man or woman to start a boy or girl in that direction than it is to murder or to snatch a baby, and by the long test I think they are right, by a long test, you see, in terms of soul destruction within a body that stays alive with a craving that cannot be satisfied.

We need to know America! And then we need to know this Hydra-headed monster Communism. I have no illusions about this thing. I am terribly disturbed over Korea right now. May I stop just a moment with that? Just cease fire if the moment comes. Have you ever known a conference with Moscow to be finished? Have you? My fear is that we shall be immobilized there indefinitely, that we shall be held there indefinitely, and that in the meantime Moscow will be free to move, as she is free now, anywhere and in any direction and will continue this process of attrition. We need to believe, and firmly believe, that there is no reconciliation between American freedom, the American way of life, this free initiative—name it as you choose—and anti-God, atheistic Communism. Whatever they say, whatever they do, in whatever direction they move, they are going irresistibly toward their goal. They are going toward their goal with evangelistic furor, with dynamic religious passion. As of their new order they are moving always, and we cannot afford to be deceived. To be deceived now is to invite greater disaster. Between Communism and the American way of life a great and impassable gulf is fixed and the depth and breadth of that gulf and the impassable character of that gulf are indicated by this basic reference: Men and women, "In God We Trust," is something more than four words upon a coin. It is the heart of America.

We must have our faith in God and our faith in freedom, these two V twins, and to this hour the destiny of America has been spelled out by those words—"In God We Trust."

I do not mean that we have been all that we should be. I do not mean that we have practiced always as we should. This faith of our fathers is living still, but when the test has come we have greatly believed. Yes, there is the gulf; there the gulf is. Does that mean war? No—not if we are intelligent and strong. The formula is strength with patience because if what I have said is true then Communism has at its heart the seed of its own destruction, but it takes time for seed to germinate; it takes time for the seed to come to the harvest. And what you are doing is buying time.

And what do we see? In Hungaria the multiplication of these infamous trials, the latest trial of Archbishop Groesz, the strengthening of the underground in Poland and in Czechoslovakia, Yugoslavia's resistance to an international scheme and infamy, and trouble brewing behind the Iron Curtain—liquidation everywhere. And failure in Red China. O, I wish that there were time to talk about that because a good

deal of my life has been invested in China, at least twenty-five years with a great industrial school.

All of these manifestations justify me in saying that the seed is slowly germinating and in the end truth crushed to earth rises again. We are buying time—buying it as of the airlift, buying it as of developments in Greece, buying it as the strengthening of Turkey, buying it with Eisenhower in Europe, and with God. And in the Far East we have demonstrated the same courage and same intelligence. Yes, strength with patience.

I have a friend in Buffalo. He is my friend. We walk apart in many matters, but he is my friend and has been since college days. I thought that he struck me a blow below the belt two years ago when he said, "What did your boy get by dying?"

But he shocked the answer right out of me and I knew as I had not known before. I said, "John, he and all the others, and thank God that a vaster number came back, fought for us to give us the chance to keep on talking."

You can make a case for defeatism today very quickly and very easily. By economic tests conditions are definitely worse off than they were when the Kaiser began his infamy. Certainly conditions in the world are worse than they were before Hitler broke his evil vow and moved into Poland. And what do we say of these things? Well, they gave us the chance to win the peace; that is why they fought for us; and, Mr. President, this great gathering is evidence of the argument I make. We would not be here today if they had lost. There would be no free discussion. All the freedoms would be gone. Your freedom to worship and my freedom to worship and every other freedom would be gone. This is not a time for defeatism. Winning the war and winning the peace significantly are one, and the dead have not died in vain, men and women, and thus we do not live in vain unless we are too soft, too frail, and too unintelligent to go forward to finish the work they left in our hands. That is it! And so long as I have a bit of breath in me it is my solemn obligation, my high privilege, to pay the price of freedom right now, as the men on the Dorchester paid the price, and as the men in Korea are paying the price of freedom here and now.

Every man to his own. That is the great word. Do you remember the Galilean who was called the Prince of Peace and who being called was not afraid to die for the truth? One day He said: " . . . every man to his own, and shall leave me alone; and yet I am not alone, because the Father is with me." That's it. That's the spirit that sent men and women marching in other times; the Pilgrims in New England, the Dutch and the Jews on Manhattan, the Swedes and the Quakers in Pennsylvania, the Catholics in Maryland, the Cavaliers in Virginia, and the Scotch-Irish in the Carolinas, and then their children and then the mingled strains, in all the crossings, rolling down the Oregon Trail presently, until at last this courage of the founding fathers and mothers pushed the frontiers of America deep into the Pacific, where they are today.

Price of freedom—now. I say that what I am talking about does not make World War III inevitable. In fact it is the only hope of avoiding World War III. Strength with patience, not strength without patience, because strength without patience could be just another dictatorship, and patience without strength would be a futility and a folly.

I flew the airlift four times. The enemy did not think that we would do that. There was a risk in it, too, and the weak ones said that we would invite World War III. Well, we moved in and we defeated the blockade. And you remember what was said when we took over in Greece: "Don't do it." That is what the weak ones said, "You invite war with Moscow." But it was strength; it was the answer of strength.

Yesterday in Detroit I talked to one of your Detroit fellow citizens who is just back from an extended visit to Turkey and to Greece, and what he told us in that small gathering, twenty-four of us, about his discovery in Greece was heart-rending. He said the attitude of the Greeks toward us was inspiring beyond words. We had been firm out there too. The government has been reorganized out there, but he said, "I was not anywhere in Europe where the attitude toward the United States was not only so friendly, but so understanding, where we are in such good repute, where they believe in us as they believe in us there." Then he went on to Turkey and found the same thing.

Strength with patience! You do not win a shooting war—whatever you may think about a shooting war, and I have seen too much of three of them—by not winning it.

Whatever my attitude may be toward mortal conflict, I tell you that one thing I learned, and learned the hard way with the old First Division in World War I, was that when you went in it the only way to come out in triumph was on ahead straight through! There may be justification for not doing it, but there is never justification for staying in battle without fighting to the utmost and to the last.

Tragedy comes to us all. It came to our house again just a few days ago. I had a cousin, Helen, fifteen years younger than I who had a boy fall, a lovely tow-headed seven-year-old boy when I saw him last. He had grown up in the meantime. He spent twenty-two months in Germany after the shooting war ceased and came back and graduated in June a year ago with honors, was a football man, a Phi Beta Kappa, and he married just about a year ago. In May he was called up and went out to the Pacific as a lieutenant. Fifteen days after he left his home in Johnstown, Pennsylvania, he was dead in Korea. He had just one day in Tokyo. He flew over. In his only letter to his mother he said, "We are not ready, but we are going up." He is one of thousands. I am using him as an illustration. I lose him now; I think only of the thousands—140,000 as against perhaps 300,000 men thrown in.

I spoke at the dedication of the first great battle cemetery in Korea just last fall. There was something about it that moved me strangely beyond anything that I had experienced before; the moving back and forth and to and fro, and the countrysides were ravished beyond anything that I had ever seen. That's it. That has significance for me today, and we cannot afford to be emotionally destroyed or swept off our feet. We have to see the hardness of this thing because we for ourselves and for generations unborn are fighting the great battle for freedom of mankind. We learned that wars could not be isolated and now we know that peace cannot be. Never again can the United States of America enjoy the justified hope of that enduring peace, men and women, unless the world has that hope justified, unless all men and all women and all little children have that hope justified. We cannot have it for ourselves unless they have it, because, you see, the scriptures are fulfilled and we are one of another. We cannot change that.

My friend from Los Angeles said this morning, "I am a long way from home," and I said, "Yes, about ten hours." The geography of distance has been annihilated. You can whisper around the world. I engaged in a national flag exchange program in Melbourne, Australia at 11 o'clock on Sunday morning. I gave the flag of my country and they gave me theirs. This was at 11 o'clock on Sunday morning and Mrs. Poling listened to the program by short wave the day before it happened. The international date line took care of that. We must be helpfully and rather hopefully one of another.

I am already rewarded for my visit here because I am going to hear Judge Murphy, one of the great Americans. I saw him in action when he did not see me at all. Twice I went down to that crowded courtroom and I thanked God for the size of him. Physically? Yes. But mentally and spiritually, a man in action typifying America at her fighting best. I am sorry he cannot be a judge and Commissioner at the same time. There is leadership in this country worth following now, leadership that justifies our faith, faith of our fathers, yes, living still in spite of dungeon, fire, and sword. But I am just as important in my place and you are just as important in your spot as these others. They cannot stand and stand firmly without the foundation that we built. Every one of us in this great team has a place. My place may be behind that central stairway up which the crowd passes, but if it's empty it is empty because I am not there and there will be a certain incompleteness until I find my spot.

Dignity of citizenship reborn in men and women today is what we need first of all. That is strength, that strength. Then we may go forward steadily throughout all conferences with intelligence and patience. We stand upon foundations of strength—spiritual, moral, and physical. Make no mistake about it. You might say, "Preacher, you are out of coat, aren't you?" No, certainly not, I consent to police protection. I want more of it for my family than I have, yes, and when I do that, if I understand Christian ethics, then I am bound to help lift that principle of police force and that police protection until it covers you, until it covers every other community. And in these disturbed times I am bound to lift that principle until, in so far as it may, it covers not only America and free peoples, but all who would be free, because we are one of another. It is like that.

I had the high privilege of serving Karl Compton, who is chairman of the President's Advisory Commission on Universal Training, and some of my ecclesiastical contemporaries have abused me severely. They insist upon associating what we were doing then and there with what they called wartime conscription. That commission was named in December 1946 and we made our report in May and the President accepted it and passed it up to Congress asking that it be activated quickly. It was May 1947, so long ago as that, and we just have what we have now. I saw men unprepared, undisciplined, untrained, committed to battle in World War I and I saw it happen again in World War II. At Bastogne in January and February I helped take bodies out of shrinking snowdrifts, bodies of the old Pennsylvania National Guard, men of the band flown in untrained and undisciplined, and we buried them. I came back and I said if I ever have anything to do with that again, God help me, I will not forgive myself. So we brought in this report. If that report had been activated four years ago, three years ago, two years ago, there would not be a single man in uniform anywhere in this world without at least six months of basic training—not a man! But we did not do it, and so it happened again.

I visited Okinawa in 1949 and all bases in the Pacific and I saw the older men; and perhaps your seventeen-year-olds enlisted with your consent when the opportunity came and enlisted for peace, enlisted to get it out of the way, so that if he could he would go on with his educational preparation. Then the evil came down from North Korea and we flew in everything we had. We took the boys who were working on housing in Okinawa and we flew them in. Last September in a hospital at Tokyo I visited a lad who would be eighteen this January. He would never be anything but his head again if he lived to be a hundred; his spinal cord had been severed by a fragment. He never heard a shell go overhead before he was committed to battle. I saw two blind boys. The sergeant introduced us. They were not quite eighteen, and the sergeant told me that when they came up they did not know the mechanism of the weapon placed in their hands. They did the best they could to get them informed, but their eyes are out. They will never see another sunset nor look again into the face of a mother.

I know a little about this; not much. I know a little about this, and I am telling you as a clergyman under God I am bound to bring my faith down to the grassroots of life, and faith now must be reconciled with reality. If I understand the gospel, that is the gospel.

One thing and I am done. The price of freedom now is unity, not uniformity — unity; all races and all faiths and all economic groups, Americans all. We achieved that during the war in wonderful measure.

I think I will run the risk of telling a story—I was asked to tell it—that I told before. I came into Natal in 1943 first. I was there three times in 1943 moving to and fro. I came into Natal first in April of 1943 and I found an old friend waiting for me on the landing strip, Chaplain Overstreet. Today he is missing in action. With him was Patrick Ryan, a younger man. I needed a replacement for my wristwatch and I asked him if he would take me into the city to help me find a strap. He said, "I'm sorry, I can't go this afternoon because I am conducting the Jewish service for Pat Ryan, the Catholic priest. I said, "Now, listen!"

He said, "Well, we came here and we found seventy-two Jewish boys and no resident rabbi, so we organized them and they have their own ritual and they have their own cantor, an RAF pilot with a baritone voice—and that was some voice; I heard it that evening. He said, "For the spiritual message, Ryan brings it one sabbath evening and I bring it the next, but Ryan is sick, so I am taking his place tonight."

I said, "All right, Sam, I am not interested in my watch. I am going to stay right here and watch a Baptist parson pass matzoth to the Jewish boys for our own Catholic priest," and I heard the equivalent of that all over the world. I saw the groups of the various faiths in turn meet under the roof of the same tent on the islands of the Pacific and in the Philippines. I saw the altars dressed for each holy occasion. I am not asking for that now. That would be unnecessary and unwise. But is it not fair for me to say that unless we can bring that spirit into the peace, Mr. President, and keep it in the peace, we will have no chance to win the peace? And it is harder to do that, to win the peace, to live together, than it is to die together because there is a certain impulse of utmost terror perhaps in battle. You do not ask questions then. You are together; you have to be. But the peace is more difficult,

the humdrum of the peace, but we can do it.

This is a loaded peace. It is no longer a cold peace any more; it is a cold war. We had better be together.

In Philadelphia we have just completed the main entrance of a memorial which is the gift of the Fraternal Order of the Lions. It is the memorial of the four men who went down on the Dorchester. Three of them were very young to be chaplains and clergymen in their faiths, and the fourth was a veteran. He had been decorated in World War I and was wounded in that war—Chaplain Fox. He was a Marine and he came back and entered the ministry and was aboard the Dorchester. We are now remembering them in Philadelphia. It is not a theology, not a doctrine; it is a symbol. We are lifting a torch there to help light the road of freedom and unity across this continent. There are three altars on a revolving, electrically controlled platform, each altar filling exactly one-third of the space. Temple University will conduct the suitable services there all through university year, beginning on the 17th of October this year, and it will be a very wonderful thing. On the east wall you have the mural of the sinking, the four figures in life size, and facing it you have three great bronze tablets with the names of all the men. Then you come in under the eternal light that does not go out and you face these words chiseled in the top, "The Chapel of Four Chaplains—An Inter-faith Memorial. Here is a sanctuary for brotherhood. Let it never be violated." On a great bronze tablet at the right are the names of 172 chaplains of the three faiths who lost their lives in World War II. That, after all, is significant of the price of freedom—now! American unity, not uniformity. Uniformity is sterile. I do not want it for my country. You cannot have unity unless there are differences, and you cannot have unity unless there is a cause that justifies it and you cannot have unity unless you have a spirit that strengthens within each of us, within each faith, and within each group, every worthy loyalty. That is America!

I wrote these verses in North Africa when I received word no father ever wants to get, and I offer them now as signifying the spirit of the message of this hour—What price freedom—now:

"They kept their rendezvous with death
so valiantly and soon
They pledged their youth and gave their
all and rested them at noon.
Now God will give them greater things
and have them by His side
And rested they shall build new worlds
where death itself has died."

You have honored me with this invitation. I thank you, and God bless you. (Applause).

PRESIDENT STICHTER: Thank you, Dr. Poling, for this most stirring address.

Ladies and gentlemen, there are in attendance at our convention nine of our past presidents, some of whom may not be known to all of you and particularly may not be known to the new members. I am going to ask each past president who is here in the room to stand as his name is called and take a bow.

Mr. George W. Yancey, who was president from 1932 through 1934. (Applause)

Mr. J. Roy Dickie of Pittsburgh, president from 1935 to 1936. (Applause)

Mr. Milo H. Crawford of Detroit, president from 1938 to 1939. (Applause)

Mr. Oscar J. Brown of Syracuse, president from 1940 to 1941. (Applause)

Mr. Pat H. Eager of Jackson, Mississippi, president, 1943 to 1944. (Applause)

Mr. F. B. Baylor of Lincoln, Nebraska, president from 1944 to 1946. (Applause)

Mr. Lowell White of Denver, president from 1947 to 1948. (Applause)

Mr. Kenneth P. Grubb of Milwaukee, president from 1948 to 1949. (Applause)

Mr. L. Duncan Lloyd of Chicago, president from 1949 to 1950. (Applause)

I had hoped that we would have with us at this convention Senator Willis Smith of North Carolina who was president from 1941 to 1943, but he was unable to be here. However, he has sent a very fine representative in the person of his son. Will you stand up, Willis Smith, Jr.? (Applause)

These gentlemen have served our association well and we are greatly indebted to them for the contribution which they have made to the prestige and success of this association. Let's give them a hand. (Applause)

I hope the other past presidents will pardon me if I should make some specific reference to one of our past presidents who recently has had a great honor bestowed upon him. Mr. Milo H. Crawford of De-

troit was recently given the degree of Doctor of Laws at Marietta College. Milo, take a bow. (Applause)

I am going to ask Ray Caverly of New York City to present to you our next speaker. Ray, will you come forward please? (Applause)

MR. RAY N. CAVERLY (New York, New York): Mr. President, that should not be a very difficult task. It is indeed a very pleasant task for me. I say it should not be very difficult because I am sure all of you who look at television or read the newspapers know what he looks like. He probably has been the most photographed man in the State of New York at least, if not in the United States, for the last year or two years, certainly for the last year. He is what you might call photogenic. Perhaps that is one of the reasons the photographers like to take his picture, and they like to publish it in the newspapers not only in New York but throughout the country.

Our next speaker has many claims to distinction. One of them is that he is the brother of Fireman Murphy, one of the famous pitchers of the New York Yankees. A second is that he is the husband of lovely Ann Murphy, who is here as our guest too. (Applause) A third is that he is also a Doctor of Laws, so he might be addressed by various titles today. He, as you also know, is the Police Commissioner of the great city of New York. He is not only the Police Commissioner of the great city of New York, but one of the greatest police commissioners that the city of New York has ever had. (Applause) May I remind you that one of his predecessors, Teddy Roosevelt, went from the position of police commissioner of the city of New York to become the President of the United States. (Applause) He likewise has the distinction, that I believe he is most proud of today—and at this time yesterday I could not have told you this—he is today the Judge of the United States District Court for the Southern District of New York. (Applause) I say I could not have told it to you yesterday, although we all suspected that it would come to pass rather rapidly, and yesterday the Senate confirmed it, so that he is now officially a United States Judge. In presenting him to you I hardly know what to say, whether to call him Doctor, Commissioner or Judge. You can take your choice. He is going to speak to you about a subject, the title of which is known to you, "The Trial of Alger Hiss." I am quite sure that no matter what the subject assigned to him was, sooner or later he would get around to the trial of Alger Hiss because whatever honors come to him in the future—and I hope many more will come to him, as I am sure they will—it will never be forgotten that he was the prosecutor in the trial of Alger Hiss. He was the prosecutor who so successfully brought two trials to a very satisfactory conclusion, at least to a conclusion satisfactory, I am sure, to all of us here.

I give you Doctor, Commissioner, Judge, whatever you want—let's just call him our good friend Tom Murphy! (Applause)

The Trial of Alger Hiss

HONORABLE THOMAS F. MURPHY
United States District Judge
New York, New York

I HAVE been asked to talk about the trial of Alger Hiss. In one sense it reminds me of the times in law school when we were forced to read the old English or Irish cases that usually began, "My Lords, this is a simple case," and then you just wandered through thirty or forty more pages to find out what the facts were.

The trial of Alger Hiss was quite complicated. It began in an atmosphere that did not concern me at all. A special grand jury was sitting in New York and had been sitting for almost fifteen months enquiring into violations of the espionage laws. I dare say until almost the end of their term they had never heard of Alger Hiss. I know I hadn't. The first knowledge I had of the man's name was in August of 1948 when Whittaker Chambers testified before a House Committee in Washington. He

testified on August 3, if you recall, pursuant to subpoena. At that time he gave a short description of his own life and said that he was then one of the senior editors of Time—incidentally, making $30,000 a year—that he had gone to Columbia, did not graduate, and he said that he had joined the Communist Party in 1923 and that he had worked assiduously for the Communist Party, becoming the de facto editor of the Daily Worker and then the editor of the New Masses. Then he went in the underground and in 1934 at the direction of the Party he had gone to Washington.

He was under the immediate supervision of a man by the name of Peters. Peters was the head of the underground movement in this country. He preceded Eisler. He said his purpose in going to Washington was to set up a parallel apparatus. Apparatus is a German name somewhat similar to a cell. He said there existed in Washington at that time a cell of Communists, all of whom had in some way jobs connected with the government, principally the three-letter agencies. He said it was the plan of the Party to set up another to get into Justice and into the Commerce Department, State, Treasury, Interior, and they sent him down to set up that apparatus and to look over the existing cell and to pick out people that he thought would be most likely to succeed. He described the people he found at that time and he mentioned ten names, including John Abt, Lee Pressman, Collins, and Alger Hiss. Alger Hiss was the last name he mentioned.

He said that he picked Alger Hiss and through the Party and at the Party directions Hiss moved from where he then was as Assistant General Counsel to the AAA to Justice, where he became Assistant Solicitor, and again at the Party's direction moved from there to the State Department where he became the assistant to the Assistant Secretary of State. He then described how Hiss subsequently became head of the Far Eastern Section and then had set up the Dumbarton Oakes and subsequently became the Secretary of the Conference at the United Nations in San Francisco. That was the substance of his testimony on August 3.

Immediately Mr. Hiss in New York, who was then President of the Carnegie Endowment for World Peace at $20,000 a year, issued a statement denying categorically the testimony of this man Chambers and demanded the right to be heard by Congress so that he could openly controvert the statements, and Congress gave him that opportunity on August 5.

Hiss in substance said that he was not a Communist, never had been, that he did not know the name Whittaker Chambers, and that was a subtle distinction. He said that he had graduated from Hopkins, had gone to Harvard, was on the Law Review, worked for a law firm in Boston for a while and another in New York, and went in 1930-some-odd to the AAA as Assistant General Counsel under Jerome Frank. Then he described his advancement in government service and made a very excellent impression on most of the members of Congress and, I am sure, on most of the people of the country. And that was what I knew about Alger Hiss—the testimony that had been transcribed and printed in all of the papers.

But what I did not know or did not then realize was that immediately commencing with August 5 the Communist Party with their members and legions of friends started a campaign of villainy against Whittaker Chambers by means of the press and radio, magazines, and more adroitly by a whispering campaign, which I am sure must have caught up with each and every one here. It affected me, because I got the impression without any knowledge at all—no knowledge—that Chambers was some sort of a ghoul that had come up out of a hole somewhere, pointing fingers at one who apparently was most typical an American.

The impression was such that I was in Europe in December of 1948 and when I read of the indictment in the Paris Herald Tribune I was completely confounded. I just couldn't understand how the United States Government would attempt to try a case against a man who had such an enviable reputation, particularly since his accuser was of such a low cast; and I dare say that that was the impression of a great many people. In fact, I had the opportunity of writing a letter to one of the men in my office and I told him that I had read about the indictment and I asked him in the letter what poor fellow was going to have to try that case. I soon found out.

I had been in Europe for three months on a rather large income tax case. I had indicted the wife of the former French Ambassador for holding out some $2,000,000,000 on Uncle Sam and I was traveling throughout Western Europe at $6 a day.

Try that sometime. (Laughter). Then try to bring your wife with you also.

I came back in February of 1949 and within a matter of a week or two the then attorney general, now Mr. Justice Clark, called me and told me that I was the guy who was going to try it.

I started to do a little reading. One of the things that I read almost immediately was the testimony before the House Committee that had not then been published. The indictment, as you know, charged perjury and said in substance that Hiss had lied when he had testified before this grand jury that he did not in January, February, and March of 1938 turn over to Chambers certain secret State Department documents. The indictment also charged that he lied when he said he had not seen Chambers since January 1, 1937, the year before these documents were alleged to have been turned over. I read the transcribed testimony before the House Committee where they each testified in secret and separately after August 5.

Congress was in the same position that you would have been in. One man said one thing and the other man said directly the opposite. Both were brilliant men. My own opinion is that Chambers was the brighter. He did not have the same formal education that Hiss did. He left Columbia, as I said, voluntarily to join the Communist Party and the day that he did he wrote a letter to his professor, Mr. Van Doren, telling him that he had joined the Communist Party and that he was then happy.

Chambers was a very prolific reader. When he was in high school in Rockville Center he taught himself German and French to such a degree that when he went to Williams where he matriculated first, he passed the German and French examination given to seniors for their degree. He did that on his first day. Subsequently as he grew older and worked for the Party he made ends meet by translating a number of German and French books. You might be interested in knowing that it was Chambers' translation of Felix Salteen's "Bamby" that permitted you to see and enjoy the movie "Bamby." He got $50.

They called the two men in separately to testify before only the committee members of Congress and they said to Chambers in substance, "Mr. Chambers, you have told us that Alger Hiss was a Communist in 1934 when you met him and was until 1938 when you quit the Party. Now, if you knew him, as you say, intimately, there must be a great many family details that you know about. Did you visit his house?"

Chambers then outlined a number of the small intimate family details that one would acquire only if he was very intimate with the Hiss family. He told them, for instance, the various houses that they lived in in Washington. He knew Mrs. Hiss' maiden name. He knew the name of her first husband. He knew where in Mexico they were divorced. He knew, for instance, that she was the plaintiff in the Mexico action. He knew how much she received in alimony by the month. He knew the child's name. He knew where the child went to school. He knew the name of the dog that they had. He knew where the dog was boarded during the summer months when the Hisses went down to the Eastern Shore in Maryland. He knew that Hiss was a bird watcher. He knew a great many things that only a person very closely associated would know.

Then they called in Mr. Hiss. Hiss before they started to question him announced to the committee that he had heard that Chambers had given a number of intimate family details. That puzzled me. I do not know today how he heard about them. The testimony was given in secrecy. It was given only to members of Congress. Of course it was transcribed. Anyway, he did say that he had heard and obviously his information was correct. He said coming down on the train from Peacham, Vermont to testify that he did a little thinking and he wrote down on a piece of paper the name of a man who might be this fellow Chambers. He said he wrote down the name George Crosley and he said George Crosley was the man that he met in Washington in the early thirties who was, as he described him, an indigent newspaper man—assuming that there are other kinds (laughter). He said that Crosley used to come to him when he was acting as counsel to the Nye Munitions Committee and ask for information that was available to other newspaper men and he used to see him infrequently, but he used to give him whatever was there and subsequently Crosley asked him whether he could rent his apartment. He wanted to write this little story that he had been working on and his family was coming to

Washington and if Hiss could rent him his apartment for the summer he would appreciate it.

Hiss said he did rent the apartment and the man lived in it for three months during the summer of 1934, I think, and that fellow Crosley used to put the arm on him every once in a while for a buck or two and, anyway, he was a deadbeat and had beaten him out of about $20 and never paid the rent and "That's probably who this fellow Chambers is, this George Crosley." That was his first appearance before the House Committee in secret session.

Then they recalled Chambers and asked him about the renting of the house, asked him about the lending of the money, and whether he ever represented himself as a newspaper man. Chambers said that that was completely untrue, that he never represented himself as a newspaper man, that he was a functionary of the Communist Party, that Hiss was a member of the Party, and that he was Hiss's superior. He said he did live in Hiss's house and did not pay the rent, as none was asked.

Then Hiss told about the Ford he gave Chambers when the Hisses made this leasing arrangement. He said he gave Chambers a Ford in order to bind the lease. They dickered about the arrangements and he just threw in his old Ford because he had two cars at the time, and he sort of sealed the bargain with the Ford.

Chambers was called back and Chambers said that that was untrue. He said that Hiss did have a Ford, "But I can remember very distinctly that he wanted to give the Ford to a poor Communist worker and he wanted to give it to a man who was working through the South," and Chambers told him that that was very bad Communist practice for a person in the underground to deal with anybody in the open Party. Hiss insisted and Chambers said that he would ask Peters and that Peters said,

"No, you can't do it. It is verboten."

Hiss kept pressing and he said that he knew a party that would take care of it, that there would be no repercussions. He said he knew a man who ran a parking lot who could handle it. He finally went out and Chambers said, "All right, go ahead," and that is all Chambers knew about the car.

The House Committee started to work on that car and they found that the car was transferred from Hiss to a concern in Washington called Cherner Motors. They got the records of the Cherner Motor Company and found that, yes, they received it, and, yes, they sold it to a man by the name of Ruben. Their records were intact, but there was no record of this transaction. They confronted the Cherner people with the assignment of title and they said, "Yes, that's our seal; that's our name; we obviously did get the car and we obviously did sell it to Ruben. In fact, we took back a $25 chattel mortgage." The records were intact, the invoices were all kept in consecutive order, and there was no record of this transaction.

I read all of that testimony and then I came to the part where on August 17 Hiss and Chambers met face to face before the committee. Hiss asked three or four times, once at the public hearing on August 5 and then subsequently when he was interviewed privately, "Where is this man Chambers? I would like to see him."

Then they showed him picures of Chambers that were taken on August 3 and he said that the name Chambers meant nothing to him and as he looked at the picture he looked up at Congressman Mundt, now Senator Mundt, and said it looked like him. In any event they met on August 17 in New York and it was the testimony of that confrontation that completely convinced me that Hiss was lying.

Bear in mind that the purpose of the confrontation was to enable Hiss, a graduate lawyer, to say to three members of the committee, "This is" or "This is not the man I know as George Crosley," a rather simple, factual issue. So the two men met and Mr. Hiss asked the committee whether they would ask Mr. Chambers to say something, so Chambers said, "My name is Whittaker Chambers. I am one of the senior editors of Time."

Then Hiss asked the committee whether Chambers' voice was the same then, on August 17, as it was on August 3, and the committee thought that his voice was the same. Then he asked the committee to make him read something, so they gave him a magazine to read—Newsweek, by the way—and he read a paragraph. Hiss then asked the committee for an opportunity to question Chambers and they gave him that opportunity and he asked Chambers whether or not he ever leased an apartment from him.

That is interesting because that prior,

secret testimony had never been divulged to anybody. Chambers said, "No," he had never leased an apartment from Hiss.

Then Hiss said, "Did you ever live in an apartment of mine on Twenty-ninth Street in Washington?"

Chambers said, "Yes, he did.

"Well," Hiss said, "how can you account for the fact that you didn't lease the apartment and you admit living there?"

Chambers said, "We were two good Communists together, Alger, and you gave me the apartment."

Without batting an eye Hiss asked for permission to enquire further. He asked Chambers whether he had his teeth fixed since 1930 and Chambers said, "Yes," he had his teeth fixed. He told what condition they were in in 1934-35. He said they were in bad condition.

Hiss asked, "What did you have done to them?"

Chambers replied that he had some extractions and had gotten a denture. Hiss wanted to know the name of the dentist and Chambers told him the name of the dentist. He wanted to know the city and he was told it was Westminster, Maryland. This was for the purpose of identification.

So then Hiss said to Chambers, "Will you open up your mouth?"

Chambers opend his mouth and Hiss looked into it and he turned around to the committee and said, "This is George Crosley."

When I read that exhibition by an intelligent man, which was put on solely for the purpose of identification, I was completely convinced that Hiss was lying. As a matter of fact that whole testimony was given to the jury *ad nauseam* because we read the whole transcript of the testimony. In summation I gambled with the jury because I am always afraid to be humorous in a criminal trial. However I thought the testimony was so important, that it went so much to the direct issue in the case, that of lying, that I would gamble with them and I told them that when they go into the jury room they should keep foremost in their minds this story of the confrontation because that would give them the cue to all of the other answers.

I said it reminded me of a story of the hippopotamus and giraffe who met in the jungle. The hippopotamus cottons up to the giraffe and says, "You remember me, don't you?"

And the giraffe says, "No."

The hippopotamus says, "Why, you must; we were very close friends."

"No, I don't recall you."

"Why," he said, "we lived together for five years in the jungle. Don't you remember me at all?"

The giraffe said, "Open your mouth."

And the hippopotamus opened his mouth and the giraffe looked in and said, "My God, it's George Crosley, sure." (laughter)

After August 17 things started to develop a little rapidly because at the conclusion of that meeting Hiss dared Chambers to say publicly without the immunity of a witness before a committee that he was a Communist. Chambers said he would be glad to do it and within a matter of a day or two without consulting a lawyer or anybody he was the guest at a radio program—I think it was "Meet the Press"—and he publicly stated without the cloak of immunity that Hiss was a Communist during the years that he knew him.

A lawsuit started almost within a matter of a month, although it was publicly announced by Hiss that a lawsuit would start. Hiss took the federal court in Baltimore, Maryland as the forum. He had as his lawyers a rather large Wall St. law firm, Debevoise, Plimpton and McLean, and engaged a Baltimore firm whose name I forget, but the principal man was Mr. Marbury, related to the famous case of Madison against Marbury, and they started this action for defamation. He sued for $50,000 and before Chambers' time to answer came they filed a supplemental complaint and raised it to $75,000 and Chambers filed an answer in which he admitted the allegation and the publication and pleaded truth as the defense.

The day that the answer was served Chambers' lawyer was served, and, by the way, he was represented by a man named Cleveland whose father happened to be president at one time. Immediately upon the joinder of issues, Hiss's lawyers were served with the notice of examination before trial to be conducted in the law offices of Mr. Marbury. They served notice requiring Chambers to appear and he appeared.

The examination was conducted mostly by Mr. McLean from New York. It ran about 1400 typewritten pages. Every question possible was asked of Chambers from

the time that he was conceived until that day. Chambers answered every question unequivocally and he refused to answer no questions. Whether the questions were embarrassing or not he answered them. It gave to the Hiss forces a complete, accurate picture of Chambers' entire life from the time that he was born right up to the day of the examination. As a matter of fact, at no time during either trial was any other information available to the defense other than the basic information that Chambers previously and readily gave them under oath.

He told what a boy he was in high school. For instance, when it came time to deliver the valedictorian address in high school Chambers submitted a prepared speech and the principal said, "No, you have to write something different." Chambers told me that he forgot what the speech was about, but he said it was a little sarcastic so the principal told him to write another and he did write another, submitted it, got approval, and then on the day of graduation delivered the first one. (Laughter.) He told all about his wanderings after high school and before he went to college. He went away from home as a boy, got a job down in Washington laying the car tracks on New York Avenue and then wandered down to New Orleans and lived down there in a pretty lowly dive, and described a one-eyed prostitute that was also a tenant there. He also remembered that the landlady was tubercular. He told about living a Communist marriage with a girl named Ida—I forget her last name—for a period of years. He told about bringing her home to his mother's home. He told all the intimate details about his life that they asked him.

After the second day of this pretrial examination Mr. McLean asked, "Do you have any papers in the handwriting of Mr. Hiss that would prove your defense?"

Chambers said he thought he had. He said, "When could you get them?"

Chambers said, "Well, it will take me a couple of days, I think," and they adjourned the examination.

Bear in mind that his lawyer never objected to any question either. So Chambers then went to a relative of his wife, a lawyer in New York, to whom in 1938 he had given a folder. Chambers had testified that he broke with the Communist Party about April of 1938. He said at that time he had saved some papers and had given them to this man who was a lawyer with instructions to keep them; in case anything happened to Chambers he could open the briefcase and from the contents would know what to do with it. Chambers described in this pretrial examination that it was Hiss's practice to receive certain papers from him about every two weeks. He said that about 1937 he had brought Hiss to New York where he introduced him to a Russian Army Officer named Bykov, and they agreed that Hiss would periodically take papers that passed over his desk and give them to Chambers when Chambers would meet up with him about every two weeks. Chambers, in turn, would take them over to Baltimore, photograph them on microfilm, return them that very evening, and then Hiss would put them back in his desk the next day. After a while that procedure was improved because the Party was not getting enough papers, since Hiss would only take papers every two weeks, and they agreed that Mrs. Hiss could help, that Hiss could take home papers each night. Mrs. Hiss would type the copies of them, Hiss would return them in the morning, and then on the fourteenth day there would be this accumulation of typed copies, plus whatever original papers he would take that day, and then Chambers would pick up the entire loot, photograph them, destroy the copies, return the originals, and Hiss in turn would put them back in the desk.

So Chambers went to New York to his wife's cousin. He in turn went to an old dum-waiter shaft where he had cached this envelope some ten years before, took it out, and brought it down to Baltimore, but only showed his lawyer, Mr. Cleveland, these forty-some-odd typewritten pages, four handwritten memoranda, and did not show him the three cans of microfilm and about eight pages of yellow foolscap. The reason he did not show the yellow foolscap was that that was in the handwriting of Harry Dexter White, who was at that time the Assistant Secretary to the Treasurer. That was not involved in the Hiss lawsuit. He did not show him the microfilm because he could not read the microfilm. He needed to have an enlarger and he did not want to involve other people unless he was sure, so he showed his lawyer these typewritten pages, the handwritten notes, and the next

day they produced them at the lawyer's office.

Chambers said in substance, "You asked me the last time whether I sad some papers in the handwriting of Mr. Hiss that would tend to prove my defense. Here they are," and you can imagine that the examination stopped that morning. It stopped very abruptly. Mr. Hiss was telephoned by his lawyer and they arranged to meet that night in New York. Judge Chestnut was consulted and he decided that they had better show them to the FBI, so copies were struck off, the lawyers kept some, and the originals were given to the FBI.

The FBI then had two problems: One, they had to first ascertain whether the typewritten and handwritten copies were copies of State Department documents; and, two, if they were, whether they were typed by Mr. Hiss or some machine that he had control of and whether the handwritten notes were in his handwriting. They went to the State Department and within a matter of a few days ascertained quite quickly that all of the typewritten sheets were exact copies of State Department telegrams, for the most part, passing between our embassies abroad and the Secretary of State here in Washington. The four handwritten notes matched three State Department telegrams. The fourth one they could not find. Then they found out very quickly by comparing Mr. Hiss's handwriting when he became admitted as a lawyer in New York—you have to file a very, very lengthy handwritten application for admission—with the handwriting on the handwritten notes and came up with the opinion that the handwriting was identical.

The next problem was whether the typing was typed on a machine that belonged to Hiss. Bear in mind, this grand jury was sitting in New York all this time, so you can see that they soon heard about these latest developments, and they called both Hiss and Chambers in and they each testified before the grand jury for about twelve days each.

In the meantime the FBI wanted to talk to Mr. Hiss and they asked his lawyer, Mr. Marbury, whether he could come to the office in Baltimore. Hiss came surrounded by two lawyers. He gave a fifteen-page typewritten statement which he dictated. The most important part of the statement related to his knowledge of the existence of a Woodstock typewriter. The FBI experts had decided that all of the forty-three pages were written on a Woodsctock upright typewriter with the exception of one page, so they asked Mr. Hiss and Mr. Hiss swore under oath to the FBI with the advice of his lawyers that his wife did have an old standard upright typewriter that she received from her father who was an insurance agent in Philadelphia. He could not recall the name of the typewriter, but he said he could remember that his wife sold it sometime after 1938 to a secondhand dealer in typewriters in Georgetown. The FBI then started to look in Washington for the typewriter.

In the meantime Mrs. Hiss was called to the grand jury and she could not remember the name of the typewriter either. She remembered that they had this large, upright typewriter. She also remembered that they had an L. C. Smith and some other portable. She herself testified under oath that she could not type; in fact, she said she was a longhander. They also asked Mrs. Hiss about her maid, thinking that perhaps the maid would be a good witness if one could be found who would know something about the typewriter and know something about the visits to the house. She could recall the name of the maid that they had from 1928 to 1934 and she could recall the name of the maid they had from 1939 to 1945. As to the maid for the intervening important years, her name slipped her memory, and then she recalled, yes, she did have a maid by the name of Catlett, but she was dead. That maid subsequently testified—reincarnated (laughter). But that was what the FBI had to work on.

Hiss evidently told his own attorneys the same thing about the typewriter, because as the FBI were looking in Washington and Philadelphia for this Woodstock typewriter they were bumping into the investigators for Hiss. They had thirty-five agents in Washington going all over the town and came up with nothing. But then they found a Catlett boy, one of the sons of Mrs. Catlett, and they asked him whether he knew the Hisses—of course he did—and whether he had ever seen the typewriter in their house—and he was positive that he had not. Oddly enough that same boy on that same night, after the visit by the FBI, went to Donald Hiss, Alger's brother, and said that the FBI were asking him about a typewriter and he told him that he had told them that he did not know of a typewriter,

but he remembered the typewriter quite distinctly and he could find it for the Hisses if they could get up about $40.

To make a long story short, they found the typewriter in about two or three days. It had been in the possession of the Catlett family and through them it went to some relative and then some junk man got hold of it. In any event, some family in Washington did have the typewriter. It was a Woodstock typewriter and it was not sold to any dealer.

The Hisses testified in their defense that when they moved into this new house on January 1, 1938 in Georgetown they gave the Woodstock typewriter to these two boys, the children of their maid, so they could play with it and since they gave the typewriter away on January 1, 1938, obviously they could not have typed the disputed documents.

The FBI in starting to develop the identity of the typewriter went off on another tangent. Assuming that they could not find it they decided that they had better get some standards of comparison, so they inquired of a great many insurance companies. They also made inquiries at the school where the boy went. They found out that Mrs. Hiss went to the University of Maryland for a summer course and they made inquiries there and came up with quite a few standards of comparison. They had a typewritten letter that was signed by Mr. Hiss to the Boy's school explaining the boy's personality. He was changing schools. They also found two or three letters with two of the insurance companies. They also found a letter that Mrs. Hiss had written to the University of Maryland in 1937. They found a speech that Mrs. Hiss had delivered to the Alumnae Association of Bryn Mawr when she retired as their Washington President in 1938. Using those standards of comparison the FBI experts came to the conclusion that all of the typed documents with one exception were typed on that machine that had typed the five or six standards.

As I say, that information was brought into the grand jury, they confronted Mr. Hiss with their findings, and he denied that he had typed or his wife had typed or that either or both had given the documents to Chambers, and he further denied that he had seen this man Chambers whom he knew as Crosley since January 1, 1937.

He was indicted on December 15, 1948 for those charges of perjury, but the examination before trial was not finished so the examination before trial continued with the consent of Judge Chestnut and over the objections of the government up until about the end of March 1949. I suggest to you that that is an ideal practice in a criminal case, to examine the government's principal witness after the indictment, but they did and they asked Mr. Chambers questions—what did you testify to before the grand jury?—so they got all of his testimony for a period of twelve days before the grand jury. Then of course they examined very closely about all of the documents that he had submitted and that the grand jury had. Then they received a Bill of Particulars from the government in which we had to give them everything that they asked for.

At the trial one of the important issues, as I said, was the typewriter. It became important because, as I said, the defendant claimed that the typewriter was out of his possession when the documents were typed since they all bore the date between January and March of 1938. The Hisses testified that they had given it to these two boys. The boys testified that they had received it at that time. Fortunately one of the FBI agents had interviewed this one boy and he had given the FBI a short statement. In that statement he said that he had received the typewriter about the time that the Hisses moved into this new house and since the typewriter did not work too well he took it to a repair shop at the corner of Connecticut Avenue and K, which is one of the busiest corners in Washington, and he described the corner because he said that there was a radio station on the same floor.

With that nicely signed and put away they went to investigate Connecticut and K. They found out that there was a Woodstock repair place at that corner, but it did not come to being until about September or October of 1938, and that there was no typewriter repair place there prior, which conforms a little bit with what probably happened. We will never know when the Hisses actually gave the typewriter away. Obviously they did give it to the boys. I suggested to the jury that they did give it to them, but only after Chambers' defection, because put yourself in the same position Hiss was. If he was a member of the Party and if he was stealing these docu-

ments and if his wife was making copies of them, he knew immediately that Chambers quit that somebody might be looking for him in the event Chambers talked. What would you do with the typewriter? Would you take it over the Q Street bridge and drop it? Maybe somebody would be looking at you. Maybe they would find it. Would you drop it in the Potomac? Somebody might be looking there too. Supposing the FBI agents came to his house immediately after Chambers quit and talked and found the typewriter in the house? Supposing he was in the act of destroying it in the house and the agents walked in? All of those would have been very nice pieces of evidence. I suggested to the jury that he thought all of that out and he decided to give it to this family without education who would just abuse it and it would over a period of months or years just sort of disintegrate and end up in some ash can, all traces of it gone. We do not know. But that was one of the issues in the case that had to be decided by the jury.

It reminds me of the confrontation story because I talked to one of the jurors about a week ago and I was told that during the night that they were deliberating—they had deliberated until about ten o'clock and then went to a hotel—she saw teeth all night in her dreams. But one of the most important things in the trial that I had to decide upon in the very beginning was how to overcome this feeling that I knew existed of sort of hatred for Chambers. I knew it existed. I had heard of it. I had somewhat the same feeling myself in the beginning until I had read the testimony and knew the man. I also had the problem of how to overcome the charm that Hiss had as a human being. I decided that the only way the jury would get the same feeling that I had with regard to Chambers was to keep him on the stand for a long period of time and let him, so far as the judge would let me, tell the story of his early life, so that the jury could get to know him and get the feeling that here was a man educated, but consumed in an alien philosophy and who went voluntarily into the Party, and because of his great desire to read became absorbed in all of these foreign ideologies.

Chambers has a most engaging smile, sharp as a whip. Not once during the entire trial, cross examination or otherwise, did he hesitate for an answer. If the answer was No, it came out just as quickly as if it was Yes.

We had a little fun. I forget whether it was Mr. Stryker—I think it was—was asking Mr. Chambers about the fact that Chambers had sent his young daughter to a sort of fancy school in Baltimore. It seems the Chambers family were living in Baltimore and their young girl was, I think, four or five years of age and the mother was an artist and she inquired of Hiss as to where was a good, progressive school in Baltimore and she was told the Park School. She went there and found it was very expensive. She offered to teach sculpturing if they would let the child go for free and they agreed. Stryker on cross examining Chambers wanted to bring out that Chambers was nothing but an underground agent and he was sending his child to a more than middleclass scool, so he was developing that a little bit and he said to Chambers, "Now, that's a class school, isn't it?"

Chambers replied, "You mean class in the Marxist sense?"

Stryker said, "Oh, drop it."

Stryker had a young boy about twenty years of age who was one of the investigators for the House Un-American Activities Committee on the stand. He was the boy who had accompanied Chambers on December 2 before the indictment back to his farm from Washington. Chambers had been called to Washington to testify in some hearing and when he left that day he took these three cylinders of microfilm and put them outside his house in a pumpkin that he had hollowed out. He did that because for a period of weeks on his farm a lot of strange people were running around making observations, and so forth, and obviously they were investigators for the Hiss people in the lawsuit and he did not want them to be in his farmhouse while he was in Washington and come up with this microfilm, so he put them in the pumpkin. They have become known as the Pumpkin Papers. Actually, they were not papers at all; they were just microfilm. When he went to Washington the House Committee had evidently heard of the activity of the FBI and this examination before trial and the submission of these documents, and, if you recall, there was a political campaign going on at that time, so they served Chambers with a subpoena telling him to pro-

duce forthwith any other papers or material that he had.

So this young fellow came back with Chambers to the farm and Chambers pointed out the pumpkin and he took out the microfilm and they went back to Washington where they developed them. Incidentally, one was light struck and they could not use that at all, and the other two turned out to be one relating to Hiss and one relating to somebody else. The microfilm were the photographic copies of the original papers that passed over Hiss's desk, many of them with his own initials on them. So when that boy was on the stand testifying Mr. Stryker wanted to know whether the pumpkins were arranged in some geometrical pattern. He was trying to prove that this whole action of Chambers was bizarre and it would tend to be more bizarre if the pumpkins were arranged in some peculiar pattern. He asked this boy to describe the pattern. The boy said they were just pumpkins. "Well," he said, "wern't they growing in sort of triangles?"

"No," he said, "they were just growing the way God had grown them."

"Well," he said, "what would you say the olfactory condition was?"

The boy said, "They were green." (laughter.)

We had a man named Henry Julian Wadleigh who testified for the government. Mr. Wadleigh was a man of very high educational attainments. He was born in this country, a son of an Episcopalian minister, and went to Europe when he was three years of age with his father, who was, I think, the Director of the Church of Paris. He was educated at Oxford and received his A. B. degree there. He received a Masters degree from the University of London. He took another course at the University of Kiel, then came back to this country and took another degree from the University of Chicago, and he went to the AAA in 1934 and went to the State Department about the same time that Hiss was there.

He testified that he became interested in Fabian Socialism in England and was concerned with Socialism in this country and became greatly disturbed over the rise of Nazism and Fascism when he was with the State Department. He testified that he used to know a girl who used to be a Socialist and he had heard she had become a Communist, and while he was in the State Department he went to her and asked her whether there was something he could do to help the cause of Communism because he believed that Communism then was the only active force that was fighting Fascism and Nazism. He said, "There are papers that come across my desk in the Trade Agreements Section that might be of assistance to the Party."

And she replied, "We will have a man see you," so one of Chambers' men caught up with him and over a period of two years he was a supplier of documents to the Party.

Mr. Wadleigh was an unusual looking fellow. He was quite tall with very closely cropped hair and had rather large, expansive teeth, extremely thin, and had the habit of folding his legs three or four times around when he sat down. He had come as a complete surprise to the newspaper men attending the trial, since when he was called by the House Committee to testify he had refused to testify. That was a matter of public knowledge and it was quite publicly known that he had refused to testify before the grand jury, so that when he did appear as a witness for the government there was a great deal of excitement in the courtroom with the newspaper men running out to telephone their offices and finally when it all quited down and I was about to ask Wadleigh his name, Lloyd Stryker leaned over to me and said, "A handsome son of a gun, isn't he?" (Laughter). Well, everything broke loose again. But we did have some interesting and humorous interludes during the trial.

When I knew that the psychiatrist was going to testify—and that, by the way, was rather a novel think because in the first trial the psychiatrist was permitted to sit within the railing area right before the jury box and next to counsel for the seven days that Chambers was testifying, ostensibly taking notes, and then he was permitted to get on the stand in the first trial and to be asked a hypothetical question and not allowed to testify. We were confronted with the problem again in the second trial and Judge Goddard told us that he was going to allow him to testify. I had done some work on it in the first trial and in the second trial had to do much more. I can tell you that I consulted two world famous psychiatrists for a period

of about one hundred hours, mostly at night, during the trial.

I was furnished a great many textbooks by these men and others and with their help anticipated what the medical conclusion was going to be, namely, that Chambers was suffering from a psychopathic personality. I also was told by the doctors, who verified it in many textbooks, that nobody knows what those words mean, so you can see the field was wide open. But I was quite concerned in any event, because I had never examined an alienist or psychiatrist and I called up a lawyer in New York who had represented defendants in negligence cases for forty years and I asked him whether he could give me any advice on how to handle this mindreader, and he said the only advice he could give me after forty years was to not to talk about medicine with the fellow. He said, "If you can get on fishing or baseball or something like that it is much handier."

He said he was examining a brain man twenty or thirty years ago and, "The guy got me inside of a brain and I was two days getting out." (Laughter.)

One of the FBI agents was very helpful to me. He suggested that I ask the psychiatrist whether he had a sign outside of his office, "No waiting—thirty couches." However we did notice something during the direct testimony which, although of little actual importance, had a great psychological effect on the jury. We did notice that Dr. Binger was continuously looking at the ceiling for inspiration or help or something, and we decided that the thing to do was to get that over to the jury in some fashion. We felt there would be no sense in merely calling it to his attention and to the jury's attention at the same time unless we knew that the jury was conscious of the same idiosyncrasy, so when I started to cross examine him I had an agent with a stop watch just clocking the various times that Dr. Binger looked at the ceiling, and after we had collected that data then I had agreed with the various FBI agents that were sitting with me at the table that when I gave the signal I would look at the ceiling each time the Doctor looked at the ceiling and then the agents would look, hoping that the jury would also look. (Laughter). We did that for about ten minutes. Every time I asked Dr. Binger a question he would say, "Well," and look up, I would look up, and the agents were all looking up, and the first thing you know the jury were all looking.

Then I said, "Doctor, you have been doing this for fifty times out of fifty-nine minutes." I said, "Is that a sign of psychopathic personality?" We had a great deal of fun with that.

We got into a little bit of a tiff about mindreading. We got off on a tangent and he sort of let slip that he could sometimes tell what a person was thinking of, which is pretty good, you know, so I said, "That ought to come in handy, Doctor. Now, could you tell, for instance, what a person was thinking in this case? Supposing I was on the street and I met a man and we started to talk and I suggested, 'How about lunch?' and he was very impatient and he was just tapping like this all the time (indicating with foot), and I said, 'How about Tuesday?' He said, 'Well, make it Tuesday.' What do you think was on that man's mind?"

He said, "Well, he might not have wanted to go to lunch with you."

I said, "He also might have wanted to go to the bathroom." (Laughter.)

We had some very important testimony. Chambers testified that when he was making plans to quit the Party—of course he did not confide in anybody but his wife—one of the things he decided to have was a car that could really go. He had an old beaten up car that the Party had given him back in 1930, so he was talking to Hiss about buying a new car, not telling him his plans, and telling him how the Party could not give him any dough and he was breaking his back running from Baltimore to Washington every day; so Hiss said he would give him $400, and he actually did, and with the old car, the $400, he was able to buy a new Ford. This, by the way, was in 1938. (Laughter.) We proved the withdrawal of $400 from the bank, which brought the Hisses' balance down to $16, and the purchase of the car, which was done with cash, a trifle over $400, on the next day in a little town in Maryland.

We thought that that was fairly decent evidence and when the Hisses got on the stand they said that they withdrew the $400, but they did not of course give it to Chambers, that it was withdrawn by the wife to buy some furnishings for the house that they were going to move into. Then I asked her what the furnishings were and she could describe some curtains and chairs

that she remembered, but she sort of got lost as to what the other things were and I pressed her quite a bit on the $400, and it was quite obvious that being an intelligent woman she would not have withdrawn $400 out of a savings bank. She had a checking account. She had a charge account in all the Washington stores. They had not leased the house and it just did not make sense to be buying furnishings for a house that they did not have a lease on and to draw out cash and keep it in a sugar bowl some place when she had a checking account and the other charge accounts.

Evidently it did not make too good an impression on all of the jurors in the first trial, because I was talking to one and I was told that that was one of the things that she thought the government was weak on, that $400 item. She said that she had some experience herself along that line and Mrs. Hiss's explanation was quite reasonable. She said that about fifteen or twenty years before she rented a summer bungalow and she remembered that before she moved in, almost a month before she bought a beach umbrella. (Laughter.)

We had a very difficult situation in the first trial which I did not know just how to handle. The jury was just impaneled and the FBI got a phone call from a lawyer saying that one of the jurors had a wife who was ill in a sanitorium in New Jersey and the wife announced to some fellow patient that her husband was on the jury and he was going to vote for the defendant. That's a nice thing to start a trial off with if you are representing the government. So I told the judge that that was our information and in the presence of Mr. Stryker and the other lawyers outside of the jury room, of course, I suggested that what we ought to do was ascertain whether the juror had a wife and whether the wife was at the hospital, and whether she said what she was alleged to have said. They all agreed that that was the thing to do first, and the FBI did that that day. They came back and said that he did have a wife in the sanitarium and she was alleged to have said it, so I said to the judge, "Well, what do you think we ought to do?"

He said, "Well, what do you think?"

I said, "I am not going to move for a mistrial, but it seems to me what we might do is this: You might call the man in and say that we have this information and we do not want to embarrass anybody, so why don't you get sick and we can put one of the alternates in your place?"

Mr. Stryker did not think that was a good idea. He thought the juror looked like a real upstanding fellow and we ought to keep him sitting right there. He looked all right and that's the way it ended. Whether or not his wife actually said it or not, I do not know, but there I was from the first day of the trial with that information and every time I looked around and looked at the jury I said, "My God!" However I tried to do something about it in summation.

I did not know how else to handle it so I waited until the last fifteen minutes of my summation and I started to develop the question of prior ideas or prior sympathy or bias or prejudice and I reminded the jurors that we all had it and we all had some preconceived ideas of almost everything that we read, but that in a jury trial you stand up and tell the judge under oath that you are going to try the case and put aside all questions of preconceived judgment. I said that is the way I hoped the jury would be in this case; "as a matter of fact, you told both lawyers under oath that is what you were going to do," and I said, "even if you told your wife." "You, Mr. Juror, supposing you told your wife how you were going to vote," and he just blanched all over; I thought he was going to swing at me. But it did not do any good; the jury was 8 to 4 for conviction.

Ladies and Gentlemen, it has been a pleasure to talk to you. The case has so many different ramifications that I could go on for hours, but I think I have told you the basic elements that were involved. It is a case of two men caught in a sort of whirlpool of history, two brilliant men.

I am not too sure what the moral is. I think you can draw, however, some reasonable inferences. I think you can without any hesitancy draw the inference that Hiss was a full-fledged member of the Communist Party underground, and when you arrive at that conclusion everything else makes sense, but what makes the most sense is the realization that at least then in 1938 the Communist Party had gone pretty far into our government. Perhaps then it was not so unpopular as it is today, but when you sit back and think that a foreign conspiracy can integrate to the top echelons of our government, it is mighty serious. As Dr. Poling has said, freedom

then comes at a price. We do have to constantly fight. We do not know how far removed we are today. We do not know how far the integration has gone, but you can at least surmise that if it has gone that far we are in pretty dangerous position. (Applause)

PRESIDENT STICHTER: Thank you, Judge Murphy, for a very, very fine and interesting talk.

As soon as the tumult and shouting dies down we will have the report on the awarding of prizes, and after that will be the report of the Nominating Committee.

We will now have the report of the winners of the golf and bridge prizes. Mr. Carey.

MR. L. J. "PAT" CAREY (Detroit, Michigan): The winners of the men's bridge prizes will be announced by the chairman of that committee, Mr. Beale Rollins.

MR. H. BEALE ROLLINS (Baltimore, Maryland): I want to say that the winners of the men's bridge and canasta prizes are as follows, but before that I would like you to know that the men's bridge affair was a howling success. Four of the five members of the committee attending the meeting this year won prizes. The fifth did not play. The winner of the first prize was Wayne Ely. He chose a CarSac. Marshall H. Francis, the winner of the second prize, chose a travel alarm clock. Alex J. Rogoski, winner of the third prize, chose a fitted toilet case; A. C. Epps, a CarSac; Oscar J. Brown, a wallet; Frank F. Ernst, a Schick electric razor; Charley Howell, an Evans lighter; John Elam, a Parker Butane lighter; Bill Buchanan, an Evans lighter; Duncan Lloyd, a cuff and tie set; Cameron Buchanan, a wallet; Edward Taylor, a wallet; Al Rives, a cuff and tie set; and Ambrose Kelly, a zippered toilet case.

Kraft Eidman won the first canasta prize. He had second choice and fortunately for him Wayne Ely left a G. E. electric alarm appliance attachment radio. Byrne Bowman took a Schick electric razor. Yours truly took a travel alarm clock. George Schlotthauer took an Eversharp desk pen, and John Wicker a Ronson butane lighter. They all said they had a good time. We of the committee enjoyed being on the committee and winning. (Applause)

MR. CAREY: The prizes for the ladies' bridge were table prizes and I believe the names of the winners are to be posted on the board. Is Mrs. Betty Schlotthauer in the room and does she care to read or give us the names of the ladies' bridge winners? I believe she is not here; however, we had some sort of a tentative agreement that she would post the list on the board.

The winners of the men's golf prizes will be announced by one of the members of the committee. The chairman of that committee unfortunately, Jimmy Donovan, had to remain away from this meeting because of a death, I believe, in his family. The two vice chairmen have done yeoman work, as I understand, Mr. Ken Cope and Mr. Pat Eager, but they have delegated the handsome, debonair John Anderson to make the announcement. I believe that the winners will have to wait here until after the meeting is over to come up and select their prizes. John Anderson.

MR. JOHN H. ANDERSON, JR. (Raleigh, North Carolina): Thank you, Pat.

Mr. President, ladies and gentlemen: The golf tournament was a fine success for a lot of other people and I think the members of the committee have had a fair percentage of the prizes. However, I do not know whether we equaled the last report or not. There were 120 players in the tournament, which is the largest number we have had in a long time. As you know, we played Old White and Greenbrier with Greenbrier being penalized one stroke for the low gross only. I have a list here which I will read rather rapidly, but first I want to make the announcement about the cup. As I told you yesterday, Mr. Charlie King has very graciously donated a silver cup, which Mr. Pat Eager holds in his hand, which will be awarded for the first time this year, to be retained by the winner until next year and then to be passed on to the succeeding great golfers of this Association. We are going to ask Mr. Charlie King to present this cup. Is Mr. King here? Apparently he is not here.

The winner and the man with the first low gross, with a score of 75, is Mr. Stanley Burns. (Applause) Will Mr. Burns come forward and receive the cup?

Is Mr. King here? The Executive Committee has accepted this cup with the

thanks of the association to Mr. King. In his absence Mr. Cope will present the cup to Mr. Burns.

MR. KENNETH B. COPE (Canton Ohio): Mr. Burns, it gives me great pleasure to present to you, the first winner, this cup to hold during this year, and may you come back and show your good golf and retain it for another year, but you will have to try for it.

MR. STANLEY M. BURNS (Dover, New Hampshire): Thank you very much, and I want to thank Mr. King.

MR. ANDERSON: In addition to that he has first choice of the very beautiful prizes which your chairman, Jimmy Donovan, has purchased and that selection will be made at the conclusion of this session.

MR. PAT H. EAGER, JR. (Jackson, Mississippi): Let the winner select his now and let the rest of them follow.

MR. ANDERSON: Possibly he has not had a chance to look them over as yet, but if he would look them over after the close here, Pat, if that is all right, then I will call this list rapidly and ask the winners to stand and come forward to this corner and have a seat close by so that at the conclusion of this session you may line up and make your choices. If the winner is not personally present here I would ask someone of his friends to take his prize to him and make the choice for him, or possibly if his wife is here she would do that. They might do that anyhow. (Laughter) You are invited to bring your wife up here to help you make the choice, in any event.

The first low net was won by Jimmy Smith, Mr. James Smith. He also had second low gross, but we could give him but one prize. He had a low gross of 77 and a first low net of 71. There were three 71's, but the lowest handicap of those three was given the first prize and then the others were awarded in order to avoid complications.

Samuel "Kit" Carson had second low gross. Mr. Carson?

A VOICE: He left, but I got his proxy.

MR. ANDERSON: William Sadler, second low net. He won that prize and all of my money too. Earl Gammage, third low gross of 82. Orrin Miller, third low net. Stanley Long, fourth low gross of 82, and I believe he added one, making it 83, a fine score. H. A. Ringel, fourth low net. P. L. "Lee" Thornbury, fifth low gross.

A VOICE: He has left, but I have a proxy for him.

MR. ANDERSON: Fifth low net, Lee Bradford.

A VOICE: I have his proxy too and I will be up in a minute.

MR. ANDERSON: Do you want the bellboy to come with you?

Hal Baile, sixth low gross, 85. Is Hal here? Does he have a proxy here? Will someone come forward after the meeting and select his prize for him?

Clater Smith, sixth low net. Clater? Would somebody try to find him or get someone to represent him after the meeting?

G. L. Mitchell, London, Ontario, seventh low gross. I would like to give our friend from across the border a hand. I believe it is the first time we have had anyone from across the border. (Applause)

Seventh low net. That is John Anderson. He will have a proxy over there. Pat Eager, eighth low gross. (Applause) Jack Faude, eighth low net, 73. Harry Stiles, ninth low gross. Harry? (Applause) Louis Ryan, ninth low net. (Applause). Luther Webster, tenth low gross. Luther? Someone will represent him, I am sure. Louis Sanders, tenth low net. Howard Starrett, eleventh low net. George Blue, twelfth low net. George?

Victor Werner, thirteenth low net. (Applause) Wilder Lucas, fourteenth low net. Harley McNeil, fifteenth low net. Harley? Henry Nichols, sixteenth low net. (Applause) Ernest Reif, seventeenth low net. Is he here? (No response) Joe Stewart, eighteenth low net. Lawrence Varnum, nineteenth low net.

Marvin Williams, twentieth low net. Robert Young, twenty-first low net. Ken Cope, twenty-second low net. (Applause) Ray Caverly, twenty-third low net. (Applause).

I know Ray had a good time purchasing these prizes and I know he purchased those that he would want and I know they will suit everybody else too.

Franklin Marryott, twenty-fourth low net. (Applause) Hugh Reynolds, twenty-fifth low net. Where is Hugh? Someone will represent him.

Mr. President, that concludes the report.

PRESIDENT STICHTER: Thank you.

I have a couple of announcements to make. Following the close of this session,

Hal Rudolph and his fidelity and surety committee will have a luncheon in the Virginia Room at twelve-thirty, or as soon thereafter as they can get together following the close of this meeting.

Someone appeared before the Nominating Committee last night and left his watch. I have it here and upon due and sufficient proof of ownership thereof I will deliver it to him. Maybe it is a donation.

Someone called my attention to the fact just a moment or so ago that in mentioning the fine honor that came this year to Milo Crawford—the awarding of the honorary degree of Doctor of Laws—I had overlooked the fact that another past president had received the honorary degree of Doctor of Laws since our last convention, the Honorable J. Roy Dickie of Pittsburgh. He was awarded the honorary degree of Doctor of Laws last year at Washington and Jefferson University. If Roy is here, take a bow. (Applause)

Ladies and gentlemen, at this time I wish to say a word or two about this convention. The operating of a convention and its multitudinous facets, the convention program generally, the open forums, the general entertainment, the taking care of guests, the registration, all involve a tremendous amount of work and requires the collective effort of a great many persons and the coordination of those efforts. Without mentioning the names of any, because it would take too long to mention all by name who ought to be mentioned, I just want to say that I greatly appreciate the very, very fine cooperation I have had on every hand and to every one of you who have had a part in the running of any phase of the convention, and this applies to the ladies as well, I want to extend to you my grateful thanks. (Applause)

We will now have the report of the Nominating Committee. Mr. Kenneth P. Grubb.

MR. KENNETH P. GRUBB (Milwaukee, Wisconsin): President Stichter, members, and guests: Your Nominating Committee was in session over a period of two days and nights, a total of about 14 hours. Just about a hundred members appeared urging the nomination of various persons. We are confident that no one appeared before us for any man with whom he was not personally acquainted or for any motive other than for the good of the association. We thank each one that came before us for his interest. One very able member whom many of you wanted elected to an office appeared personally before us toward the close of our session and stated that he did not wish his name mentioned. He did not want the nomination this year and he indicated that if nominated by the committee or from the floor at this time he would withdraw his name.

While it has been a long and tedious job, we are very happy to have served you. On behalf of the committee I recommend and nominate the following men for the following offices:

For secretary, John Kluwin of Wisconsin. (Applause)

For treasurer, Forrest Smith of New Jersey. (Applause)

For vice president, Milton L. Baier of Buffalo, New York. (Applause)

For vice president, Francis Van Orman of New Jersey, (Applause)

For three members of the Executive Committee, Paul Ahlers from Iowa; (Applause) John Faude from Hartford; (Applause) and William Knepper from Ohio. (Applause)

For president-elect, Alvin Christovich of New Orleans. (Applause)

PRESIDENT STICHTER: Members, you have heard the report of the Nominating Committee. Are there any further nominations?

MR. DUNCAN L. LLOYD (Chicago, Illinois): I move the nominations be closed.

MR. F. CARTER JOHNSON (New Orleans, Louisiana): I second the motion.

PRESIDENT STICHTER: It has been moved and seconded that the nominations be closed.

A VOICE: Question.

PRESIDENT STICHTER: Those in favor will signify by saying "aye." Opposed, "no." The "ayes" have it and the members named by Mr. Grubb have been elected to serve your association. Will all those so elected come forward at this time? Come up to the front at this time, please. (Applause)

I want to congratulate each of these officers on their selection and I want to congratulate the association on the selections that have been made.

And now, from the sunny shores of California, comes my successor in office. Our Association is indeed fortunate to have for

its president this coming year a man of the ability, the zest, and the imagination which Joe Spray possesses. His performance on the Executive Committee for the past four years has merited the position which he has attained. You may be sure that under his able leadership the prestige and reputation of our Association will be advanced. I wish him the best of health and the greatest year ever.

Will past presidents Bill Baylor and Pat Eager please escort the new president of the International Association of Insurance Counsel to the platform? (Applause)

PRESIDENT STICHTER: Members of the association, behold your new president! President Spray, behold your constituents! (Applause)

Joe, I relinquish to you the gavel of authority; good luck and God bless you.

PRESIDENT JOSEPH A. SPRAY (Los Angeles, California): Thank you, Wayne.

You folks have just listened to a prepaid political broadcast. I think it was sponsored by the Chamber of Commerce of Los Angeles. (Laughter) If I had the time I would like to say a few words about our weather out there, but I haven't. However, I do want to say this: that I greatly appreciate the honor that has been conferred upon me. I do not need to tell you that, but I do want to say that I also appreciate the responsibilities of this office. No one could work under Wayne Stichter for a year and not.

About a year ago everything was peaceful and quiet out on the Pacific Coast. I had been in an office for 25 years. Suddenly correspondence began to come over my desk from Wayne and the other members. My secretary came in and said that it would be necessary to get a new file girl. Then I had to get a reader. Then she came in and said that we would have to have more space, so then we had to move our office. You all know that when Wayne undertakes to do anything he is not satisfied with just doing a job; he does it to perfection. And, Wayne, I congratulate you upon your convention. (Applause)

There will be a meeting of the Executive Committee and I would like to have all the new members present at two o'clock.

Al, where are you? Won't you come up here and say a few words? (Applause)

PRESIDENT-ELECT ALVIN R. CHRISTOVICH (New Orleans, Louisiana): Thank you, Joe.

My friends, about all that I would like to say is to assure you that I realize the tremendous responsibility ahead. I assure you that I appreciate the fine honor that you have bestowed upon me. My sincerest hope is that I shall be worthy of the trust, and I pledge you my best efforts to do a good job. Thank you very much. (Applause)

PRESIDENT SPRAY: Is there any other business to come before the meeting?

MR. EAGER: I move we adjourn.

PRESIDENT SPRAY: We are adjourned.

(Thereupon, at 12:25 o'clock p.m., Saturday, June 30, 1951, the Twenty-fourth Annual Convention of the International Association of Insurance Counsel was adjourned.)